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Gharar in Post-Formative Islamic Commercial Law: A Study of the Representation of Uncertainty in Islamic Legal Thought

Abstract

This study analyzes the conception of *gharar*, which is generally translated as either risk or uncertainty, in post-formative Islamic commercial law. According to Muslim jurists, *gharar* arises from uncertainty in commercial transactions. However, unlike other areas of the Islamic intellectual tradition in which uncertainty engenders errors, the uncertainty associated with *gharar* enables jurists and counterparties to make informed legal and financial decisions. Nevertheless, *gharar* is not structurally a form of certainty. In order to understand this interesting paradox and reach a better understanding of representation in general, this study employs discourse analysis to trace the concepts, reasoning methods, and descriptive techniques that Ibn Hazm (d. 1064), Baji (d. 1081), Shirazi (d. 1083), Sarakhsi (d. 1090), Ibn Qudama (d.1223), and Ibn Rushd (d. 1261) use in order to represent *gharar*. First, this study details how jurists conceptualize the types of uncertainty that engender *gharar in commercial transactions*. *Second, it examines the ways that jurists employ these forms of uncertainty to analyze commercial transactions. This study demonstrates that gharar arises from a privation of thought. This privation mimics the relationship between the identity of thought and referent that produces certainty. Gharar thus indicates how knowledge creates and subsumes uncertainty.*

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GHARAR IN POST-FORMATIVE
ISLAMIC COMMERCIAL LAW:
A STUDY OF THE REPRESENTATION OF
UNCERTAINTY IN ISLAMIC LEGAL THOUGHT

Ryan M. Rittenberg

A DISSERTATION

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ABSTRACT

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Ryan M. Rittenberg

Joseph E. Lowry

This study analyzes the conception of *gharar*, which is generally translated as either risk or uncertainty, in post-formative Islamic commercial law. According to Muslim jurists, *gharar* arises from uncertainty in commercial transactions. However, unlike other areas of the Islamic intellectual tradition in which uncertainty engenders errors, the uncertainty associated with *gharar* enables jurists and counterparties to make informed legal and financial decisions. Nevertheless, *gharar* is not structurally a form of certainty. In order to understand this interesting paradox and reach a better understanding of representation in general, this study employs discourse analysis to trace the concepts, reasoning methods, and descriptive techniques that Ibn Ḥazm (d. 1064), Bājī (d. 1081), Shīrāzī (d. 1083), Sarakhsī (d. 1090), Ibn Qudāma (d.1223), and Ibn Rushd (d. 1261) use in order to represent *gharar*. First, this study details how jurists conceptualize the types of uncertainty that engender *gharar* in commercial transactions. Second, it examines the ways that jurists employ these forms of uncertainty to analyze commercial transactions. This study demonstrates that *gharar* arises from a privation of thought. This privation

mimics the relationship between the identity of thought and referent that produces certainty. *Gharar* thus indicates how knowledge creates and subsumes uncertainty.

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Introduction

The Certainty of Uncertainty

I. Aims of This Study

In this study, I analyze the conception of *gharar*, which contemporary Western scholars of Islamic law generally translate as either risk or uncertainty.¹ *Gharar* along with *ribā*, which is generally translated as either usury or interest, are two central terms that pre-modern Muslim jurists employ to discuss the legality of commercial transactions.² Although modern scholars of Islamic law have examined *ribā* in order to identify the ethical influence of Islam on pre-modern commerce, they have largely ignored *gharar*.³ The lack of scholarship on *gharar* probably reflects the fact that legal discussions of *gharar* tend to be scattered more widely throughout works of *fiqh* than comparable discussions of *ribā*.

¹ For examples of the translation of the term *gharar* as risk, see Frank Vogel and Samuel L. Hayes III, *Islamic Law and Finance: Religion, Risk, and Return* (Boston: Kluwer Law International, 1998), 87; Mahmoud A. El-Gamal, *Islamic Finance: Law, Economics, and Practice* (Cambridge University Press, 2006), pp. 47-49, 58-62. For examples of the translation of the term as uncertainty, see N.J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), pp. 45, 138. For examples of the translation of the term as risk and uncertainty, see Hiroyuki Yanagihashi, *A History of the Early Law of Property: Reconstructing the Legal Developments* (Boston: Brill, 2004), p. 276; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1982), pp. 135, 146-147.

² For reasons that will emerge in the course of this introduction, I will leave the Arabic term *gharar* untranslated throughout this study in order to distinguish it from contemporary notions of financial risk.

³ For general discussions of *ribā*, see EI², s.v. *Ribā*; *Encyclopedia of the Qur'ān*, s.v. *Usury*; Vogel, *Finance*, 71-95. For a study of the historical development of *ribā*, see Yanagihashi, *History*, 212-297.

The oversight in the study of *gharar* seems regrettable since *gharar* relates in important and interesting ways to the larger and exceedingly rich discussions of epistemology and representation that dominate so many fields of Islamic and Arabic learning, such as Islamic theology, legal theory, grammar, Sufism, and Arabic philosophy. Notwithstanding the fact that modern Western scholars of Islamic intellectual history have devoted several excellent studies to epistemology and representation in the aforementioned fields of Islamic learning, they have largely neglected the study of epistemology and representation as they relate to *furū' al-fiqh*, Islamic positive law.⁴

This study of *gharar*, however, aims to do more than simply add another field of Islamic learning to our understanding of representation and epistemology within Islamic and Arabic intellectual history. Rather, this study employs *gharar* as a starting point for analyzing uncertainty in contrast to the previous studies of the Islamic and Arabic intellectual tradition, which focused on analyzing certainty. Just as importantly, *gharar* presents a new avenue for the examination of the models of representation that continue to implicitly and explicitly organize modern thought. Discussions about *gharar* along with those about uncertainty in other fields of Islamic learning thus offer a rich and nuanced set of texts with which to examine and theorize about the structure and functioning of uncertainty in general.

This study thus uses the analysis of *gharar* to make four contributions to Islamic Studies and research on representation in general. First, it elucidates a conceptually rich, important, and hitherto unexamined topic that is central to Islamic commercial law—

⁴ See footnote 16 for a list of secondary scholarship on representation and epistemology in these fields of Islamic learning.

gharar. Second, this study reassesses the relationship between the different *madhhabs*, or schools of Islamic law, in terms of the reasoning techniques that jurists employ and their legal positions with respect to *gharar*. Third, it offers new insights into epistemology and representation through the exploration of uncertainty. Fourth, this study examines the discursive techniques that jurists employ to imagine and solve the problems associated with uncertainty and *gharar*. These discursive techniques have important implications for the study of the development and transmission of Islamic law.

II. Representation

To situate *gharar* within a larger discussion of representation requires a basic understanding of representation. Such a basic understanding will provide both a terminological and conceptual starting point for the study of *gharar*. It is, however, easier said than done to provide such a brief outline of representation due to its diverse conceptions. Representation has been and remains a perennial concern of scholars in the humanities in such fields as philosophy, literature, history, and the arts to name only a few examples. Notwithstanding the material and formal diversity of these fields, scholars have in general used representation as a means to examine, articulate, and critique theories of language, epistemology, and ontology.

Prior to modern discussions of representation in the humanities, theologians, metaphysicians, and mystics had implicitly and explicitly elaborated theories about the relationships between these three fields of learning. Contemporary discussions of representation, however, are not simply a modern and secular continuation of earlier religious and metaphysical elaborations about the same topics. Rather, modern scholars

have delineated a new set of questions and answers, and in so doing they have created an important rupture with metaphysics and theology. Most importantly, the studies of these modern scholars have offered a number of important insights into and critiques of theories of representation. In particular, these studies reveal how different models of representation articulate a relationship between reality, thought, and language through 1) a notion of identity and 2) a schema that relates individual representations.⁵

In the introduction to his study of the Western epistemological tradition, Richard Rorty, a philosopher, offers the following insight into the role of identity in theories of representation;

To know is to represent accurately what is outside the mind; so to understand the possibility and nature of knowledge is to understand the way in which the mind is able to construct such representations. Philosophy's central concern is to be a general theory of representation, a theory which will divide culture up into the areas which represent reality well, those which represent it less well, and those which do not represent it at all (despite their pretense of doing so).⁶

According to Rorty, the Western intellectual tradition arose upon and remains shackled to a metaphor of Aristotle, who conceived of knowledge as a picture in one's mind of a specific referent. Knowledge is supposed to mirror a referent that exists in-itself in reality

⁵ Although not exhaustive, for different discussions of representation that touch on the role of identity and schema, see Gilles Deleuze, *Difference and Repetition*, tr. Paul Patton (New York: The Columbia University Press, 1994); Jacques Derrida, *Of Grammatology*, tr. Gayatri Chakravorty Spivak (Baltimore: The Johns Hopkins University Press, 1976); Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, tr. D.F. Pears and B.F. McGuinness (London: Routledge & Kegan Paul, 1961), esp. ¶¶ 1-3.5; Nelson Goodman, *Languages of Art* (Indianapolis: Bobbs-Merrill Company, Inc., 1968); Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979); Roland Barthes, *Elements of Semiology*, tr. Anette Lavers and Colin Smith (London: Jonathan Cape Ltd., 1967), esp. 35-88; Theodor W. Adorno, *Negative Dialectics*, tr. E.B. Ashton (New York: Seabury Press; 1979).

⁶ Rorty, *Mirror* (Princeton: Princeton University Press, 1979), 3.

beyond the effects of thought or communication. Furthermore, knowledge enables one to perfectly communicate this mental picture to another person who will then have this same mental picture in his or her mind. The better the picture the greater one's knowledge and ability to communicate it to others.⁷ Representation thus results from an identity that equates the information found in reality, thought, and communication.

The second feature of representation, a schema, relates the individual representations to each other within a larger and more complex system of representation. A schema relies on identity, but it also invokes oppositions, resemblances, and analogies to relate individual representations to each other within a web of ever increasing representational complexity. Taken together, these four types of relationship—identity, opposition, resemblance and analogy—enable the categorization of representations that forms the *sine qua non* of rational thought.

⁷ Rorty, *Mirror*, 38-44. Unfortunately, Rorty does not analyze why thought was not analogized to the other senses in the Aristotelian tradition. However, in his *Middle Commentary on Aristotle's De Anima*, Ibn Rushd sheds some light on the potential reasons that thought was not analogized to touch. Within a larger conversation about the movement of the soul, Ibn Rushd argues that the soul must be noncorporeal since otherwise thought would be a form of touch. In that case, either all or part of the intellect would think by touching intelligibles. If only part of the intellect touches intelligibles, this part must be either an indivisible point which touches the intelligible an infinite number of times since a point has no dimension, or it touches the intelligible with a divisible and finite part but it does so an infinite number of times by going over the same places. On the other hand, if all parts of the intellect touch all parts of the intelligible there is no guarantee that each part of the intellect would perceive a part of the intelligible. In other words, the whole mind could not unify the perceptions into a concept so that the problem of the infinite returns. Ultimately, a corporeal intellect that touches intelligibles could not form a finite identity since it would require an infinite amount of time and effort. Ironically, matter and touch introduce the infinite into thought and threaten its ability to form an identity. For Aristotle, the infinite eludes definition and syllogistic reasoning which form the basis of all rational thought. Aristotle resolves these issues by positing a non-corporeal intellect, which transcends the corporeal, and the common sense that unites the perceptions of the five senses into one. Abū al-Walīd Muḥammad b. Aḥmad b. Rushd, *Talkhiṣ kitāb al-naḥs* [tr. *Middle Commentary on Aristotle's De Anima*], tr. Alfred L. Ivry (Provo, Utah: Brigham Young University Press, 2002), pp. 23-25, ¶¶. 62-66.

The analysis and critique of this paradigm of representation has provided a fertile ground for scholarship. Returning to Rorty, he critiques this model of representation because it weds metaphysics and ethics so as to legitimize the seeming naturalness of various forms of domination. To be precise, this model of representation gives rise to a matrix of opposing terms, such as objectivity, subjectivity, error, correct, interior, exterior, knowledge, and ignorance, that validate systems of authority. That is, according to the Aristotelian model of representation, each question has one objectively correct answer that is independent of our thoughts and statements about it. To stray from this answer is not merely epistemologically wrong, but amoral too since it undermines reality.

To address the alignment of notions of representation with their potential exploitation for large and small forms of oppression, Rorty argues for a nominalist notion of representation that would abandon traditional epistemology in favor of his notion of hermeneutics, which recognizes the contingency of all claims of truth upon the discursive practices of a community of speakers. Although parasitic on epistemology, Rorty's hermeneutics rejects identitarian thought that assesses all positions against a supposedly objective and singular viewpoint.⁸ Hermeneutics would thus open discourse to the recognition and validation of multiple viewpoints.

There are other ways to frame the study and critique of representation. Undoubtedly, Jacques Derrida's deconstruction, which examines the fundamental contradictions in a system of representation in order to thereby reveal the impossibility of stable meanings, is the most famous modern critique of traditional theories of

⁸ For further details on hermeneutics, see Rorty, *Mirror*, chs. 7-8.

representation. Beyond deconstruction, however, there still remain virgin terrains for the exploration of representation. In particular, the relation of representation of uncertainty deserves attention for what it might tell us about certainty. Returning to Rorty's statement, "To know is to represent accurately what is outside the mind," what does it mean to be uncertain? Is it simply, "To be uncertain is to represent inaccurately what is outside the mind?" Although this is one way to define uncertainty, it does not reveal the complex and generally unequal relationship between certainty and uncertainty. Furthermore, there are other ways to define uncertainty.

Most fields of scholarship meticulously analyze and categorize their forms of knowledge and the reasoning methods that engender certainty. Unfortunately, these fields seldom discuss uncertainty with the same analytical zeal. The two important modern exceptions to this disinterest in the exploration of uncertainty are finance and quantum mechanics, in which uncertainty is irresolvable phenomenon that structures these fields.⁹

This disinterest in the study of uncertainty is not accidental. Rather, it reflects the seldom articulated, yet dominant belief that uncertainty is a subjective state that arises from either an innate naïveté or a momentary error. To be sure, there are moments of thought that range somewhere between pure uncertainty and certainty, such as doubt and probabilistic knowledge. However, these moments are not supposed to essentially link uncertainty and certainty in such a manner that certainty and uncertainty would overlap.¹⁰

⁹ This overlap in the role of uncertainty in physics and contemporary finance is not that surprising considering the fact that many involved in finance have training in mathematics and physics. In both finance and physics, uncertainty is described through statistics.

¹⁰ For example, the Muslim scholar Alī b. Muḥammad al-Āmidī (d. 631/1233) classifies uncertainty with doubt, probabilistic knowledge, heedlessness, death, sleep, and speculation (*naẓar*) in order to differentiate the epistemological value of these forms of thought from that of

At best, the types of thought that fall short of reaching the level of certainty may form the stepping-stones that eventually lead to the way to one obtaining certainty. Nevertheless, certainty must be objective truth whereas uncertainty must be subjective error and ignorance according to the common view.

If certainty and uncertainty were not self-contained contraries on some basic level this would lead to the breakdown in the fundamental categories, like truth and falsehood, that organize systems of authority. The moments in between uncertainty and certainty merely reflect the ways that one situates oneself in relation to certainty and uncertainty. Whether as a kind of conceptual innocence or inadvertent error, most fields of scholarship tolerate uncertainty in order to appropriate it and to thereby produce the certainty that ultimately legitimizes these fields. Furthermore, as Theodor Adorno reminds us, epistemological categories are often aligned with moral categories; an alignment that furthers the marginalization of uncertainty as a topic unworthy of critical study.¹¹

As stated earlier, Aristotle conception of knowledge plays a large role in pre-modern and modern theories of representation. In the introduction to Muḥammad Ibn Rushd's commentary of the *Metaphysics* of Aristotle, one encounters the elements that ensure the marginalization of uncertainty as a temporary state that is unworthy of study. These remarks offer important insight into why uncertainty remains a marginal topic of scholarly interest. According to Aristotle, humans can in principle know anything in-

certainty. Alī b. Muḥammad al-Āmidī, *Abkār al-afkār fī uṣūl al-dīn*, ed. Aḥmad Farīd al-Mazīdī, 3 vols. (Beirut: Dār al-Kutub al-‘Ilmīya, 2003), vol. 1, pp. 52-61.

¹¹ Theodor W. Adorno, *Dialectics*, 35.

itself, but our subjective thought processes, emotions, and failings complicate the acquisition of the knowledge of things as they truly are. Nevertheless, humans can overcome their individual limitations by working together to study the world and combine their knowledge to ultimately reach a perfect and objective understanding of reality. In fact, what ultimately distinguishes man from everything else in the world is man's thirst for certainty and truth.¹² Thus, the attainment of certainty regarding everything is part of the essence and destiny of mankind for Aristotle.

Ibn Rushd adds the moral argument that if something cannot be known then this would point to a mistake in the design of Nature—a word that is probably a circumlocution for God.¹³ The remarks of Aristotle and Ibn Rushd hold out the promise—a promise whose influence continues to animate modern society—that man is destined to know reality as it truly exists. If this promise were not true, reality would be irrational and amoral from the perspective of these two scholars.

Undoubtedly, it is easy and seemingly unproblematic to dismiss the uncertainty of the naive or erroneous varieties as subjective and transitory moments of thought that are unworthy of critical study. However, Umberto Eco notes that, “In order to understand a philosophical system... it is often necessary to approach it from the margins rather than the center. From the center, a system always seems well defined and hardly changeable; it is at the periphery that it gets put to the test.”¹⁴ If there were varieties of uncertainty that

¹² Muḥammad Ibn Rushd [=Averroes], *Tafsīr mā ba'd al-ṭabī'a*, ed. Maurice Bouyges, 3 vols. (Beirut: Imprimerie Catholique, 1938), vol. 1; pp. 3-4.

¹³ Ibn Rushd, *Tafsīr*, vol. 1, p. 8.

¹⁴ Umberto Eco, R. Lambertini, C. Marmo and A. Tabarroni, “On Animal Language in the Medieval Classification of Signs,” in *On the Medieval Theory of Signs*, ed. Umberto Eco and

enabled conscious and correct judgments it would be harder to dismiss them. In other words, if one could find a form of uncertainty that would enable one, “to represent accurately what is outside the mind,” this uncertainty would raise important questions about the basic concepts and terms, like truth and error, that organize systems of authority. Indeed, by standing at the margins of discussions of epistemology and representation, we would actually reach a deeper understanding of how the center structures the relation between the world, mind, and language.

III. Islamic Epistemology and Uncertainty

To pursue these issues about representation and uncertainty, I will examine some works of post-formative Islamic law, theology, and Arabic philosophy. This selection reflects my training and personal interests. More importantly, pre-modern Muslim scholars have devoted an immense amount of thought and energy to the elaboration of theories of representation in works of Sufism, *uṣūl al-fiqh* (legal theory), *kalām* (speculative theology), Arabic philosophy, and logic. These discussions of representation all share a commitment to articulating a relationship among theories of ontology, epistemology, and language. This commitment, nevertheless, articulates itself in a variety of ways that make the Islamic intellectual tradition so rich and complex.

Typically, in the introductions of works of *uṣūl al-fiqh* and *kalām*, Muslim scholars present their theories of representation by defining the terms *‘ilm*, certainty, and *jahl*, uncertainty. These two terms circumscribe the bounds of their epistemological

Constantino Marmo (Philadelphia: John Benjamins Publishing Company, 1989), p. 3. James Montgomery offers a similar approach in his study of Abū Nuwās. James E. Montgomery, “Abū Nuwās, The Justified Sinner?,” *Oriens* 39 (2011): pp. 77-78.

systems and in between them is probabilistic knowledge and doubt, or *ẓann* and *shakk* respectively. It is important to note that Muslim scholars do not consider *jahl* to be doubt, *shakk*. According to Muslim scholars, doubt occurs when one cannot decide between several competing opinions regarding an issue. Rather, uncertainty, which is generally elaborated in works of *uṣūl al-fiqh and kalām* along an Aristotelian line, refers to an incorrect identity between a referent and thought of it.¹⁵

Pre-modern Muslim scholars and modern Western scholars of Islam have detailed certain knowledge and probabilistic knowledge in minute detail. These analyses present certain knowledge as both the foundation and goal of the Islamic sciences.¹⁶ On the other hand, uncertainty does not garner the same level of treatment. Whereas pre-modern Muslims scholars define certainty first, they define uncertainty last if they do so at all. They then discuss in minute detail the forms of certainty and reasoning techniques that serve as the foundation for the constellation of the Islamic and Arabic sciences. Scholars from both groups seldom analyze and describe more than three forms of uncertainty at

¹⁵ I will examine the definitions and functions of the epistemological terms certainty and uncertainty in works of *uṣūl al-fiqh and kalām* more detail in chapter two.

¹⁶ For a general study of epistemology in Islam, see Franz Rosenthal, *Knowledge Triumphant: The Concept of Knowledge in Medieval Islam* (Leiden: E.J. Brill, 1970). For studies of epistemology in works of *kalām* and philosophy, see Josef Van Ess, *Die Erkenntnislehre des ‘Aḍudaddīn al-Īcī: Übersetzung und Kommentar des Ersten Buches Seiner Mawāqif* (Wiesbaden: Steiner, 1966); Marie Bernard, “Le Notion de ‘Ilm Chez les Premiers Mu‘tazilites,” *Studia Islamica*, no. 36 (1972): 23-45; Marie Bernard, “Le Notion de ‘Ilm Chez les Premiers Mu‘tazilites: suite,” *Studia Islamica*, no. 37 (1973): 27-56; Marie Bernard, *Le Problème de la Connaissance d’Après le Mugnī du Cadi ‘Abd al-Ġabbār* (Alger: Société National d’Edition et de Difussion, 1982); Oliver Leaman, *A Brief Introduction to Islamic Philosophy* (Malden, Mass; Blackwell Publishers Inc., 1999), 52-72. For discussions of epistemology in law, see Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta: Lockwood Press, 2013); Joseph E. Lowry, *Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfi‘ī* (Boston: Brill, 2007), 239-274; Norman Calder, “Ikhtilāf and Ijmā‘ in Shāfi‘ī’s Risāla,” *Studia Islamica*, no. 58 (1983), 55-81.

the most rudimentary level of detail— complete uncertainty (*al-jahl al-muṭlaq*), simple uncertainty (*al-jahl al-basīṭ*) and complex uncertainty (*al-jahl al-murakkab*) — as we will see in chapter two.

Like most generalizations, this one has a notable and perhaps surprising exception that offers a fruitful starting point for the analysis of uncertainty in different Islamic discourses—*gharar*. Jurists prohibit specific commercial transactions that have excessive uncertainty, which they refer to as *gharar*. However, the uncertainty associated with *gharar* is neither an undifferentiated and thus unthinkable phenomenon nor the infinite number of potential problems that might befall a transaction. Such an all-consuming conception of uncertainty would make trade and life impossible. Rather, jurists differentiate the uncertainty associated with *gharar* into several discrete forms on the basis of which they analyze and describe the legality of commercial transactions. The forms of uncertainty associated with *gharar* thus function as concepts and judgments— terms that I will use loosely throughout this study—in order to represent the legality of transactions. These forms of uncertainty thus enable jurists to make specific and valid statements about these transactions. Furthermore, *gharar* has a schema that relates the representation of individual transactions to each other so as to permit the analysis of more complex transactions. *Gharar* is thus not uncertainty as the term is commonly understood.

Nevertheless, *gharar* is not certainty masquerading as uncertainty through semantic games. Structurally, it occupies an interesting liminal space between certainty and uncertainty as these terms are commonly understood. *Gharar* does not signal an identity between thought and referent, but rather a privation of identity between these two

elements. This privation is nonetheless still bound to identity so as to enable valid judgments. Identity thus must discursively precede and subsume the negation that engenders its privation. In other words, privation is relative to identity but the opposite—the dependence of identity upon privation—is not true.

Ibn Ḥazm, whose views on *gharar* I will examine in this study, summarizes this surprising and asymmetrical relationship between identity and privation in his introductory work on Aristotelian logic.¹⁷ While discussing the affirmation and negation of a logical identity, which is formed between a subject and its predicate, Ibn Ḥazm remarks that,

As for the opposition of the acquisition of a property and its privation (*al-qunyah wa'l-'adam*), this is like sight and the privation of sight, which is called blindness. One of these terms revolves around (*yadūr 'alā*) the second, but the second does not revolve around the first. The meaning of “revolves” here refers to the relativity of terms. Although we can say blindness of sight, we cannot say the sight of blindness. Know that the acquisition of a property does not revolve around its privation, which is to say that the affirmation is not relative to the privation. However, the privation revolves around the acquisition, which is to say that the privation is relative to the acquisition. The privation is not a concept but rather it is the termination and cessation of it (*dhahāb al-shay' wa-buṭlānuhu*) such that something is only considered to have a privation when its existence is possible.”¹⁸

¹⁷ Although the terms identity and privation differ in discussions of epistemology and logic, Adorno notes that epistemology and logic have a conceptual and terminological complicity, which I would attribute to their role in theories of representation. Throughout this study, I will attempt to exploit, albeit judiciously, this complicity to obtain a better understanding of *gharar* and representation. Adorno, *Dialectics*, p. 103.

¹⁸ 'Alī b. Aḥmad Ibn Ḥazm, *Al-Taqrīb li-ḥadd al-manṭiq*, ed. Aḥmad Farīd al-Mazīdī (Beirut: Dār al-Kutub al-'Ilmīya, 2003), p. 72. *Lā yu'add 'ādīman illā man yaḥtamīl wujūd mā huwa 'ādim lahu*. Ibn Ḥazm then distinguishes between Greek notions of privation, which he claims require the ontological existence of a referent at some point in time, and Arabic notions of privation, which he claims do not require the ontological existence of a referent. Although this distinction has interesting implications for the notion of referentiality, Ibn Ḥazm still agrees that privation must work on some identity between a finite referent, thought of it, and communication of it. Although not as explicit as Ibn Ḥazm, Ibn Rushd also states that the privation is not equal

For Ibn Ḥazm, statements can only be true or false in so far as they relate to existence. Thus for a statement to have a sense, it must describe something that can possibly exist such that the affirmation of the statement must precede its negation.

This hierarchical relationship between identity and privation enables the informed decisions and valid representations that characterize legal discussions and analyses of *gharar*. Considering the facts that identity is the *sine qua non* of certain knowledge and that privation can only exist in relation to identity, it would not be incorrect to say that certainty creates uncertainty in the context of *gharar*. The uncertainty associated with *gharar* is thus the product of identity and schema of certain knowledge and valid representations.

Although the uncertainty associated with *gharar* arises from a privation, there are other forms of uncertainty that have different causes according to the Islamic intellectual tradition. For example, works of *uṣūl al-fiqh* and *kalām* detail a form of uncertainty that arises when a mismatch occurs between a referent and thought of it. This form of uncertainty, which is how people generally conceive of uncertainty, is a mistake. At the moment that a person makes this mistake, he or she cannot recognize it otherwise he or she would not have made it. It is only after the mistake occurs that time offers him or her the possibility of finding the correct identity to obtain certainty. True, one might make numerous mistakes and potentially never find the correct identity, but the truth still

to the affirmation of identity. Ibn Rushd, *Kitāb al-‘ibāra*, in *Talkhīs maṅṭiq arisṭū*, ed. Jīrār Jihāmī, 3 vols. (Beirut, Manshūrāt al-Jāmi‘a al-Lubānīya), vol. 1, p. 63.

objectively exists from the perspective of the authors of works *uṣūl al-fiqh* and *kalām*. On the other hand, another individual might come to right identity immediately without any intervening error such that uncertainty is not an essential aspect of thought.

According to Muslims scholars, the certainty and this type of uncertainty are contraries, which means that they must be equal and mutually exclusive when applied to the same subject. Thus, at some fundamental level, there must exist a form of uncertainty that stands outside of certainty as its equal. Nevertheless, in the case of *uṣūl al-fiqh* and *kalām*, certainty is always primary and subsumes uncertainty as in the case of the uncertainty associated with *gharar*. More specifically, in the case of works of *uṣūl al-fiqh* and *kalām*, the correct identity that engenders certainty serves as a reference point that invalidates all other thoughts. On the other hand, if one can obtain certainty right away it does not seem that uncertainty plays an essential role in the validation of or engendering certainty.

In both discussions of *gharar* and the uncertainty found in works of *uṣūl al-fiqh* and *kalām*, uncertainty does not exist outside of and as an equal contrary to certainty. Or to put it differently, there is not a form uncertainty that can be represented and also stand outside of certainty. As stated earlier, a theory of representation gives rise to a matrix of contrary terms, such as certainty and uncertainty, that play an important role in validating the claims systems of authority as being objective and thus natural. The fact that certainty always creates and subsumes uncertainty, however, undermines this matrix and reveals the role of representation in constituting a given system of authority. To be precise, the way that certainty creates and subsumes uncertainty depends on how a particular field of discourse configures its system representation. This configuration determines what counts

as knowledge, but just as importantly what does not count as knowledge according to the accepted standards.

Uncertainty thus unsurprisingly plays important but varied roles in claims of authority of Muslim scholars. Admittedly, works of *uṣūl al-fiqh* and *kalām* have a wider set of epistemological concerns than works of *furū‘ al-fiqh*. Nevertheless, both sets of works claim that there are objectively correct answers to relevant questions of belief and action. In the case of *uṣūl al-fiqh* and *kalām*, God has these answers even when humans cannot access them. The uncertainty discussed in *uṣūl al-fiqh* and *kalām* explains why humans can make unconsciously mistakes. In the realm of intense debates, such an explanation for cause of errors seems particularly important for justifying further debate, examination, and research.

On the other hand, in discussions of *gharar*, jurists claim that God has circumscribed the aspects of a contract that Muslim must know in order for a specific transaction to be valid. True, a transaction may have other aspects that counterparties want to know about, but these aspects do not affect the legality of the transaction according to jurists. Thus, jurists and counterparties need a form of uncertainty that will alert them to its presence so that they can obtain certainty.

IV. Methodology

The study of uncertainty within the context of representation raises seemingly paradoxical and important methodological questions about the ability to write a study such as this at all. Ideally, uncertainty should be both the object and narrator of this study. Knowledge, the goal of all research, however, ineluctably converts each unknown into a

known even if this conversion leads merely to a known-unknown. Thus, my argument about the way that certainty subsumes uncertainty in discussions of *gharar* may just be the inevitable outcome of representation. The goal with the study of uncertainty would be to locate a pure form of uncertainty in its habitat and give it a voice without implicating it in any system of representation and certainty.

There is no Archimedean point that would enable a presentation of uncertainty outside of the identity and schema of representation. Identity and schema are inherent to representation, but this does not mean that identity and schema operate in a univocal or objective manner so as ensure objective truths. Rather, each field configures its notion of identity and schema differently so that the spheres of certainty and uncertainty vary from one system to another. To put it differently, certainty and uncertainty are contingent upon the discursive practices that a community employs to represent things. By analyzing how a particular field of scholarship configures its notions of identity and schema one can understand how it circumscribes and re-appropriates uncertainty.

In order to examine how Muslims jurists develop their concepts of identity and schema with respect to the representation of *gharar*, I have adopted the discourse analysis of Michel Foucault. Generally, people associate Foucault with the sustained analysis and critique of issues of hegemony and domination. To be sure, he is interested in the relation between discourse and non-discursive systems of authority. However, discourse analysis offers a nuanced approach to analyzing the conception of representation. Or within the terms of this study, it reveals the configuration of the elements of a system of representation: its referents, concepts, modes of analysis, and the role of the subject.

Discourse analysis does not treat these elements as static and univocal givens that perdure across time, space, and different fields of learning. In fact, discourse analysis rejects notions like tradition and *oeuvre* that serve as black boxes to homogenize discourses. Furthermore, discourse analysis does not claim to provide an objective viewpoint outside of discourse. Rather, the scholar dives into discourse in order to define the contours of a particular field through its recurring elements. In turn, these recurring elements form the points where differences can be elaborated among participants of a particular community.¹⁹

My study begins within a number of inherited unities like *gharar*, *madhhab*, and the genres of Islamic law and their supposed hierarchical relationships. In this study, I rely on the works of Ibn Ḥazm, Bājī, Sarakhsī, Shīrāzī, Ibn Rushd, and Ibn Qudāma to examine *gharar* and more general formulations of uncertainty. Nevertheless, as Aron Zysow notes in his study of *uṣūl al-fiqh*, the study of Islamic law along school lines has nothing to recommend it except ease.²⁰ My analysis localizes the discursive unity that enables debates about *gharar* across boundaries of the *madhhabs*, or schools of law. Even when a jurist rejects an element of the discursive unity that constitutes *gharar*, he must tacitly acknowledge it in order to formulate his critique. For example, below we will see that Ibn Ḥazm denies that uncertainty with respect to the ability to deliver a good causes *gharar*. However, due to the importance of this form of uncertainty for all other jurists in

¹⁹ For his clearest articulation of discourse analysis, see Michel Foucault, *The Archaeology of Knowledge*, tr. A.M Sheridan Smith (New York: Vintage Books, 1972).

²⁰ Zysow, *Economy*, p 196.

their analyses of *gharar*, he cannot simply fail to mention this form of uncertainty as a cause of *gharar*. Rather, he must offer a strident critique of it.

Similarly, my study cuts across the hierarchical relationship generally posited to govern the association of *uṣūl al-fiqh* and *fiqh*. Throughout this study, I will have recourse to works of *uṣūl al-fiqh*, Islamic theology, logic and Arabic philosophy to shed light on my larger questions about the representation of uncertainty. The scholars whose works I examine are some of the most celebrated thinkers in Islamic intellectual history. They detail their notions of representation along Aristotelian lines in their works of the aforementioned genres as we will see in later chapters. Admittedly, these scholars never explicitly state that they adopt this model of representation to discuss *gharar* or other areas of *fiqh*.

One thus might criticize the use of this Aristotelian model to examine *gharar* as a forced and contrived reading of my sources. However, as I have already noted, there is no objective vantage point outside of discourse. Models of representation mediate all research. The best that one can do is to be explicit about the model employed, justify its use, and employ it to come to a more nuanced and systematic understanding of a topic. The fact that discussions of *gharar* do not follow this Aristotelian model perfectly is not a failing on the parts of our jurists to organize all of their scholarship into a flawless unity. Furthermore, this Aristotelian model of representation provides an important terminological and conceptual framework with which to begin the analysis of the representation of uncertainty in discussions of *gharar*.²¹

²¹ In a thought provoking article, Drucilla Cornell argues that scholars of Common Law should know Continental philosophy since it often provides the most “sophisticated” means to

More generally, *gharar* touches on issues of ontology and language. Although pre-modern Muslim scholars elaborate theories of ontology and language in works of *kalām*, *uṣūl al-fiqh*, logic, and philosophy, this does not guarantee that these theoretical fields directly influence the elaboration of *gharar*. By the post-formative period of law, most Sunnī scholars, such as those examined in this study, subscribed to a position of theological occasionalism that argued against the ontological contingency of events and determinacy of reality. Nevertheless, when it comes to discussions of Islamic commercial law, jurists generally argue for a high level of determinacy and contingency in goods and transactions. Islamic commercial law thus has its own unique views on reality, thought, and language which this study will attempt to uncover and analyze.

The question inevitably arises as to why the same scholars would have a particular view on reality and representation when it comes to theology and a contrary view on these issues when it comes to commercial law. Although a thorough examination of this question is beyond the scope of this study, the general answer might invoke terms like pragmatism and ideology to thereby argue that as jurists, scholars must be pragmatists or at most social engineers trying to make a better society, but as theologians, they must be strident ideologues who police the borders of orthodoxy. Admittedly, Islamic law does interact and mold society in ways that theology does not. Discussions of *gharar* attempt to shape the contours of commerce, which would affect society at large. Furthermore, some forms of legal reasoning, such as *istiṣlāḥ*, explicitly forgo textually based legal rulings in favor of rulings that address some pragmatic good. Thus, scholars

analyze a contemporary legal problem. Drucilla Cornell, "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation," *The University of Pennsylvania Law Review* 136, no. 4 (April 1988), pp. 1135-1137.

would need one view of reality when they were acting as jurists trying to shape society, and another view of reality when they were propounding theology.

Although the distinction between ideology and pragmatism as a means to differentiate the intellectual pursuits of scholars undoubtedly has a great deal of explicative power in many areas of scholarship, it is not completely satisfactory in the context of Islam. The line between pragmatism and ideology is not clear-cut. In fact, pragmatism must have its own ideology to classify the values and goals that will be pursued. As theologians, scholars probably think that their work has the ultimate pragmatic goal—salvation. On the other hand, as jurists, scholars probably would recognize certain larger ideological commitments in their elaboration of something as seemingly worldly and mundane as *gharar* and commercial law.

As stated above, the views on representation that jurists propound in their discussions of *gharar* differentiate commercial law from other fields of their scholarship. More specifically, the dissonances between the model of representation that grounds discussions of *gharar* and the Aristotelian model of representation points to the unique discursive practices that individuate *gharar* and Islamic commercial law from other areas of Islamic scholarship. Although the representation of *gharar* forms the focus of this study, scholars of Islamic intellectual history would undoubtedly benefit from a similar study of areas of Islamic scholarship to find new parallels and dissonances.

V. Secondary Scholarship

In general, Islamic commercial law suffers from an interesting poverty and richness of scholarship. On the one hand, its poverty reflects a general disinterest among

contemporary Western scholars of Islam for the study of commercial law. To be sure, scholars like Baber Johansen, Abraham Udovitch, and Hiroyuki Yanagihashi have produced a number of excellent and thoughtful studies on aspects of Islamic commercial law. However, the quantitative interest in the study of Islamic commercial law pales in comparison to the quantity of scholarship devoted to topics like the origins of Islamic law, *ḥadīth*, *uṣūl al-fiqh*, issues of ritual purity, and prayer. The current patterns of secondary scholarship reflect—either implicitly or explicitly—notions about the essence(s) of Islam and Islamic law.²²

²² For example, Joseph Schacht remarks, “Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life the core and kernel of Islam itself. The very term *fiqh*, “knowledge,” shows that early Islam regarded knowledge of the sacred Law as the knowledge *par excellence*... it is impossible to understand Islam without understanding Islamic law.” Admittedly, Schacht acknowledges that Sufism has challenged the dominance of Islamic law at various points, but he claims that all other Islamic discourses are ultimately grounded and deciphered through law. Schacht, “Introduction,” 1. Hallaq employs this quotation to not only essentialize the link between Islamic law and Islam, but to also essentialize the West, Christianity, modernity, and “Semitic” piety. Hallaq, “‘Muslim Rage’ and Islamic Law,” *Hastings Law Journal* 54 (2003), 1706-1708, 1715-1716. Similarly, Richard Bulliet remarks that, “It cannot be said too often that the law, the *sharī‘a*, is the fullest expression of Islam. The heart of Islam is the Qur’ān, God’s word, and the messenger through whom it was transmitted to mankind, Muḥammad. The *sharī‘a* is the interpretation of the Qur’ān and Muḥammad’s personal statements.” He then states that the *Sharī‘a* corresponds to the Western notion of law with the addition of religious ritual. Explicitly this passage argues for the supremacy of Islamic law on the basis of the sources it employs. However, that reason is insufficient in itself since a number of other discourses employ the same sources. Implicit in this statement, however, is the notion that law has political authority, which ensures its supremacy. Furthermore, the passage divides law into a Western analog, which implicitly Western scholars of Islamic law can ignore, and ritual where one finds the essence of Islam and Islamic law. Richard Bulliet, *The Patricians of Nishapur: A Study in Medieval Islamic Social History* (Cambridge: Harvard University Press, 1972), 28-29. For critiques of this irenic construction and study of Islam and Islamic law, see Lama Abu-Odeh, “The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academy,” *The American Journal of Comparative Law* 52, no. 4 (2004), 789-824; Lena Salaymeh, “Commodifying ‘Islamic Law’ in the U.S. Legal Academy,” *Journal of Legal Education* (May 2014). In an introduction to his recent study, Hallaq has attempted to critique discourse on Islamic law, but the rest of the work is reflective of his earlier scholarship that reveals an essentializing understanding of Islam and Islamic law. Hallaq, *Sharī‘a: Theory, Practice, Transformations* (New York: Cambridge University Press, 2009), 1-23.

On the other hand, Islamic commercial law has attracted an abundance of interest from another group—bankers, economists, lawyers, and contemporary Muslim scholars who are concerned with finance, commercial ethics, apologetics, and polemics. Over the past several decades, this heterogeneous group of scholars and financial professionals has produced a large amount of scholarship about Islamic commercial law, regularly holds conferences, and has a number of trade groups. They have even produced several very thought provoking studies on *gharar*.

Notwithstanding the interest and importance of this group’s contribution to the study of Islamic commercial law, my study sidesteps their contributions due to methodological considerations. In large measure, these are practitioners engaged in regulatory arbitrage, which engineers pre-modern Islamic commercial contracts to conform to currently accepted financial contracts and investment vehicles.²³ This scholarship thus creates a new discursive formation that subsumes Islamic commercial law to contemporary conceptions and institutions of conventional finance. The reconfiguration of Islamic commercial law merits attention due to the interesting ways that it relates to the economic development of the Middle East, rise of a middle class of Muslim investors, and contemporary discourses about modernity, religious identity, and economics.²⁴ However, those projects fall outside of the scope of the research questions elaborated for this study.

²³ Mahmoud el-Gamal has analyzed and critiqued this phenomenon. For further details, Mahmoud el-Gamal, *Islamic Finance* pp. 35-45.

²⁴ For examples of discussions of *gharar* within the discursive framework of contemporary finance, see Hennie Van Greuning and Zamir Iqbal, *Risk Analysis for Islamic Banks* (Washington D.C.: The World Bank, 2008); Muhammad al-Bashir Muhammad al-Amine, *Risk Management in Islamic Finance: An Analysis of Derivatives Instruments in Commodity*

In this study, I avoid a teleological analysis of *gharar*, which would dissipate the differences between discourses through a variety of black boxes. *Gharar* does not convey the secret intentions of the earliest jurists or a *Weltanschauung* that animates them. At the same time, *gharar* does not conform to contemporary notions of financial risk or conversely reveal a fundamental gap between modern and pre-modern legal and financial systems. Although I discuss contemporary notions of financial risk and their relation to *gharar* at various points in this study, *gharar* and contemporary notions of financial risk are two extremely different discourses.

Finally, my generalization about the lack of academic scholarship on *gharar* has one important exception that still conforms to many of my preceding generalizations about research on Islamic commercial law. Recently, Siddiq Muḥammad al-Amīn al-Ḍarīr, the former Head of the Islamic Sharī‘a Department at the University of Khartoum and former Chairman of the Sharī‘a Board of the al-Baraka Bank of Sudan, translated and published his 1967 dissertation entitled, *Gharar: Impact on Contract in Islamic Fiqh*. The work situates itself at an interesting intersection between academic research and modern Islamic finance. It presents pre-modern and modern discussions of *gharar* across all of the schools of law with extensive translations of relevant primary sources. The preface to the book states that it was translated and published to be a reference work for Muslim and non-Muslim researchers of Islamic finance.²⁵ Although its highly systematic organization and survey of a wide number of sources make it an invaluable starting point

Markets (Boston: Leiden, 2008); Simon Archer, Rifaat Ahmed and Abdel Karim, *Islamic Finance and the New Regulatory Challenge*, 2nd ed. (Singapore: John Wiley and Sons, 2013).

²⁵ Siddiq Muḥammad al-Amīn al-Ḍarīr, *Gharar: Impact on Contract in Islamic Fiqh* (Riyad: Al-Baraka Bank Group, 2012), p. 3.

for research on *gharar*, this work does not relate *gharar* and uncertainty to the larger issues of representation that interest me. In fact, the work's style along with the fact that the author occasionally indicates his legal preferences makes this work seem more reminiscent of work of *furū' al-fiqh*, a handbook of positive law, than an academic study.

VI. Jurists and Merchants

One would like to know the extent to which *gharar* maps onto the notions of risk that pre-modern merchants relied on in their actual commercial practices. An answer to this question would offer important insight into the wider relationship of jurists to other segments of society. It is tempting to segment some points of jurists' discussions on topics like value and credit risk and then map those topics onto the concerns of merchants to the extent that they can be identified. One might even justify this approach with the claim that many jurists came from families involved in commerce so that jurists were aware of the commercial needs and practices of traders.

Such an approach would, however, impoverish our understanding of both Islamic law and the practices of merchants from a number of perspectives. First, notwithstanding the fact that both groups share certain concerns, like whether a counterparty will deliver a good or make a payment in the future, it would be incorrect to assume that the discourse of each group is the same. As we will see, jurists primarily correlate the potential delivery of a good with its fungibility on the assumption that fungible goods can be easily acquired to settle a contract. In their discussions about the requirements for a legally valid contract, jurists do not discuss the creditworthiness of counterparties to the contracts. Jurists discuss and analyze the solvency of a counterparty only in cases of bankruptcy.

On the other hand, merchants probably thought about the risk of delivery or payment primarily in terms of a counterparty's creditworthiness.

Second, there are important differences in the kinds of risks that each group analyzes. My jurists have almost no interest in the market risk that merchants face. Due to a paucity of sources, we do not know how pre-modern Muslim merchants conceived of the risks that they faced is largely unknown. Fortunately, the Cairo Geniza has provided some illuminating insight into the actual business practices of pre-modern Jewish merchants. Although one cannot assume that the discursive practices of Jewish merchants and Muslim merchants were identical, it seems reasonable to assume that there was considerable overlap between the conceptions of risk between the two groups of merchants. In her recent study of Geniza documents of Jewish traders in the eleventh century, Jessica Goldberg demonstrates that most letters between merchants list prices of goods. Notwithstanding the fact that merchants seldom lost money due to the volatility of market prices, they monitored prices to determine how to allocate their capital. More importantly, these letters offer important insight into the logistical risks that traders faced to acquire, process, transport, and sell goods.²⁶ Although jurists recognize these logistical risks to varying degrees during their discussions of the *salam* contract, which I will discuss in the second chapter, these risks do not constitute a focus of legal discussion.

²⁶ Jessica Goldberg, *Trade and Institutions in the Medieval Mediterranean: The Geniza Merchants and Their Business World* (New York: Cambridge University Press, 2012), 84-85; 99-118.

Ultimately, jurists are not pre-modern financial advisors elaborating a theory of capital allocation according to some ethical norms.²⁷ Undoubtedly, discussions of *gharar* have implications for any understanding of capital allocation. Nevertheless, *gharar* is primarily a tool used in the fashioning of a theory of the legal validity of contracts. Furthermore, in so far as obeying or disobeying laws serves as an index of someone's moral standing, discussions about *gharar* are ethical. However, the forms of uncertainty that Muslim jurists proscribe do not seem to reveal the particularly unique moral and religious character of Islamic commercial law. It would be surprising to find a legal or commercial system that does not concern itself with delineating the forms of knowledge that counterparties need with respect to the good. Rather, the discursive practices that Muslims jurists use to define *gharar* reveal the unique character of Muslims jurists' notions of commercial risk.

VII. Outline of This Study

In the first chapter, I briefly contextualize the post-formative jurists and their various writings that I use in this study. In the remaining chapters, I will pursue the analysis of *gharar* in expanding concentric circles to reveal how certainty creates and subsumes uncertainty. In the second chapter, I analyze the discursive systems that jurists employ in order to conceptualize the finite forms of uncertainty associated with *gharar*.

²⁷ Ibn Qudāma makes one of the few overt statements that I could find about the relation of *gharar* to capital allocation. Ibn Qudāma advises guardians to invest the funds of orphan in real-estate since it has less *gharar* than trade. He then suggests that they should invest in buildings made of baked bricks rather than mud brick since the latter are sturdier. 'Abd Allāh b. Aḥmad b. Muḥammad b. Qudāma, *Al-Mughnī*, ed. Ṭaha Muḥammad al-Zaynī, 10 vols. (Cairo: Maktabat al-Qāhira, 1968), vol. 4, p. 181, ¶. 3106.

In the remaining chapters, I examine how jurists employ these forms of uncertainty to analyze specific transactions. The third chapter discusses a small constellation of transactions that involve *gharar* in order to underscore the role of privation in the representation of *gharar*. In the fourth chapter, I examine the ways that jurists employ analogical reasoning to represent and analyze the *gharar* associated with transactions. Finally, in the fifth chapter, I examine the hermeneutics of *gharar*, which creates a form of uncertainty that I call aporetic uncertainty. This aporetic uncertainty points to the contradictions in notions of representation that organize Islamic commercial law. More importantly, this aporetic uncertainty undermines any fixed point that would ensure a stable distribution of terms like objectivity, subjectivity, certainty, and uncertainty.

Finally, my general question about the relationship of certainty, uncertainty, and representation has profound consequences for any understanding of representation. This study draws into question any view that uncertainty and the unknown are the passive givens from which we advance in a linear and teleological path to certainty. Uncertainty—whether associated with *gharar* or other fields of learning—is not a simple contrary to certainty or a given that can simply be overcome to reach complete knowledge. Discursive knowledge actively creates uncertainty by explicitly and implicitly setting the parameters on how representation functions.

Nevertheless, the fact that discursive knowledge creates uncertainty does not mean that uncertainty and *gharar* lack an objective quality. Indeed, *gharar* allows counterparties to make certain accurate and objective statements and judgments as mentioned previously. In a more interesting sense, the discourse of *gharar* has an

objective quality that one can only begin to appreciate after analyzing the various discussions about *gharar* across the different *madhhabs* as we will see in the conclusion.

Chapter One

The Role of Uncertainty in the Construction of the Identity of Jurists

Like other studies of Islamic intellectual history, I begin my study of *gharar* by briefly contextualizing the scholars whose works I will examine. I have selected the works of Ibn Ḥazm, Bājī, Sarakhsī, Shīrāzī, Ibn Rushd, and Ibn Qudāma since each of them is an important post-formative representative of one of the major *madhhabs*, or schools of law. Each of these jurists wrote least one work of *furū' al-fiqh*, or positive law, and one work of *uṣūl al-fiqh*, or legal theory. In fact, for most of these jurists, their works of *furū' al-fiqh* became major touchstones for the commentaries and digests of later jurists.

This chapter, however, aims to provide more than an overview of the scholars and works employed in this study. In terms of the topic and methodology of this study— a discursive analysis of uncertainty— this chapter will examine the role that uncertainty plays in the formation of the institutional identity of jurists. Modern Western scholars of Islam have devoted the majority of their research to examining the role of certainty and more broadly knowledge in the formation of the identity of Muslim scholars. Their analyses rely primarily on biographical dictionaries; the genre *par excellence* for the claims of knowledge that legitimize the authority of jurists.

Modern Western scholars of Islam, however, generally neglect the role that uncertainty played in the formation of the identities of jurists and other groups of scholars. At most, modern Western scholars discuss the role that uncertainty in terms of the elaboration of several important theological and legal platforms, like abstaining from

declaring fellow Muslims infidels (*takfīr*) and explaining God and His workings (*bi-lā kayf*) as non-cognitivism. In these cases, pre-modern Muslim scholars invoked uncertainty as both a pragmatic and pious means to avoid making statements that encouraged and led to divisive behavior among jurists and non-jurists. Modern Western scholars of Islam also discuss uncertainty in its more extreme and negative form of ignorance as a means to examine how a group differentiates itself from other groups. For example, both Muslims and Western scholars employ the term “ignorance” to differentiate the Pre-Islamic and Islamic periods. In this case, the term ignorance serves to differentiate Muslims and non-Muslims.

In this chapter, I will examine how uncertainty structures and legitimizes the identity and intellectual production of Muslim scholars. Admittedly, uncertainty may take the form of a naïve innocence or momentary error that serves as starting point for the eventual acquisition of certainty, such as in the case of students. In more interesting cases, jurists also acknowledge that uncertainty is an irresolvable product and a driving force of their intellectual production due to indeterminacy inherent to language. Indeed, like the uncertainty associated with *gharar*, jurists indicate that discourse gives rise to forms of uncertainty that are an indissoluble product of representation.

Below, I will first briefly examine how the biographical tradition portrays the post-formative jurists of this study as masters of a largely certain intellectual tradition. The certainty that legitimizes the institutional authority of jurists has several important qualities that in part structure the narrative techniques that biographical dictionaries employ. Then, I will examine the works of *furū‘ al-fiqh* and *uṣūl al-fiqh* to detail the

different roles that uncertainty plays in the formation of jurists' institutional identity and intellectual production.

I. The Post-Formative Period and Institutionalization of Law

By the middle of the fifth/eleventh century, or post-formative period in the formation of Islamic law, the major Sunnī schools of legal thought had become institutionalized such that a jurist had to affiliate with one. Even Ibn Ḥazm, whose affiliation with the largely defunct Zāhirīs is problematic for reasons that I will explore below, was the product of the schools of law and invested in their institutionalization on some level. The schools of law developed and employed standardized curricula for the training of jurists in the schools' sizeable bodies of positive law and legal theory. Each school also had local leaders who oversaw the members of the school and represented the school in its official interactions with rulers.²⁸

Due to the institutionalization of the schools of law, a jurist had to ground his legal positions within the discursive practices of his school's legal thought. This meant not merely knowing the school's positions on cases, but also its methods of reasoning and argumentation, the concepts that the school employed, and the intellectual and literary history of the school. Through the configuration of these different elements, a jurist created and legitimized his legal positions. The need to master these different discursive elements led to the development of a number of important legal genres, like the *ṭabaqāt*, *jadl*, *uṣūl al-fiqh*, *khilāf*, *mukhtaṣar* and *mabsūṭ*, or respectively biographical dictionaries,

²⁸ Wael Hallaq, *The Origins and Evolution of Islamic Law* (New York: Cambridge University Press, 2005), pp. 1-3.

dialectics, jurisprudence, disputed case, digests of works of positive law, and expansive works of positive law.²⁹ I will examine the last four of these genres below in more detail due to their importance in this study and the legal tradition as a whole.

The process of institutionalization, however, did not merely turn these schools into the official ivory towers of Islam. The schools of law also became important vehicles for social and economic mobility such as in the case of Shīrāzī and Bājī. On the other hand, the schools enabled elite families to pass on their status over generations such as in the case of Ibn Rushd and Ibn Ḥazm. Furthermore, jurists interacted with and in many cases formed part of the political elite as we will see with Ibn Ḥazm, Ibn Rushd, and Shīrāzī.³⁰ By the mid-tenth century, there was a complete judicial system, and the law schools trained the professionals who staffed its various judicial positions. The authority of the law schools become so entrenched that one could not hold a position of judicial authority without membership in a major law school.³¹

During the beginning of the post-formative period of law, the political elite also began to patronize the schools of law by endowing *madrasas*, libraries, salaried positions

²⁹ Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.* (New York: Brill, 1997), pp. 60-67, 87. For a discussion of these genres and their role in the institutionalization of the schools of law, see George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981), pp. 107-122.

³⁰ For a further discussion of the role that law schools played in the formation of elite families, see Michael Chamberlain, “The Production of Knowledge and the Reproduction of the A’yān in Medieval Damascus,” in *Madrasas: La Transmission du Savoir dans le Monde Musulman*. ed. M. Gaborieau and N. Grandin (Paris: Arguments, 1997), pp. 1-36. Bulliet notes the importance of education for the formation of the elite, but on the whole thinks that social mobility through learning was more unusual in Nishapur. Richard Bulliet, *The Patricians*, pp. 56-58.

³¹ Wael Hallaq, *Sharī’a: Theory, Practice, Transformations* (New York: Cambridge University Press, 2009), pp. 60-71; 146-158.

for teachers, and stipends and accommodations for students. Although the establishment of an endowment was typically framed as an act of piety, it also ensured the consolidation of the patronized schools and created a web of bonds between jurists and other elite. Just as importantly, the same elite culture bound both jurists and political elite. Generally when thinking about the culture of the ruling elite, belletristic prose and poetry come to mind. Nevertheless, many of the doyens of Arabic belletristic were deeply invested in the elaboration and defense of particular religious values. For example, James Montgomery reads Jāhiz's (255/868 or 869) *Kitāb al-Bayān wa'l-Tabayīn* as a theological polemic rather than merely as an early work of literary criticism.³² Similarly, Joseph Lowry reads the *oeuvre* Ibn Qutayba (d. 276/889) as an attempt to unite many fields of learning into Arabo-Islamic intellectual tradition that would appeal to elite and religious scholars with a more traditionalist leaning.³³ To varying degrees, the jurists and ruling elite were invested in the elaboration and preservation of various aspects of this elite culture, which bound them together across time and space. Admittedly, under earlier rulers, who were native speakers of Arabic, patronage of Arabic belles-lettres was stronger. Nevertheless, even non-Arab rulers remained indirectly invested in this elite culture by patronizing the

³² Generally speaking, Montgomery rejects the distinction between literature and religious discourse that structures much contemporary Western scholarship on Islam and Arabic. James Montgomery, "Al-Jāhiz's *Kitāb al-Bayān wa'l-tabayīn*," in *Writing and Representation in Medieval Islam: Muslim Horizons*, ed. Julia Bray (New York: Routledge, 2006), pp. 91-94. On the other hand, Thomas Bauer argues that during early Islam, religious scholars and littérateurs were more differentiated groups, but by the post-Seljuq era that these two groups identities and intellectual interests merged. Thomas Bauer, "Mamluk Literature: Misunderstandings and New Approaches," in *Mamluk Studies Review* 9:2 (2005), pp. 108-111.

³³ Joseph Lowry, "The Legal Hermeneutics of al-Shāfi'ī and Ibn Qutayba: A Reconsideration," *Islamic Law and Society* 11:1 (2004), pp. 5-6.

religious scholars who continued to write in Arabic and transmit the Arabic intellectual tradition.

This is not to say that jurists and leaders had a totally unproblematic and peaceful relationship. Sarakhsī spent years in prison after incurring the ire of a local leader, as we will see. Nevertheless, the occasional cases of bad relations generally affirm the importance that each group had for the other. Indeed, even jurists who avoided judicial positions could wield immense authority among both the ruling elite and general population on the basis of these jurists' reputations for learning and piety. Although the extent to which the government imposed the legal views of jurists as the official law of the land is debated among modern scholars of Islamic law, what seems less ambiguous is the fact that rulers acknowledged the religious authority of jurists with policies that ranged from the conciliatory, such as with the establishment of endowments, to the draconian with imprisonment.

II. The Jurists, Biography, and Institutional Authority

In large measure, biographical dictionaries, or *ṭabaqāt*, inform our understanding of individual jurists and schools of law.³⁴ At first glance, this genre appears to be simply collections of formulaic biographical notices about members of specific groups, like jurists, doctors, and Sufis. However, in the hands of a scholar with a sensitive eye and creative mind, these biographical dictionaries have offered important insights into many

³⁴ Chase Robinson distinguishes between biographies proper, such as with the genre of the *sīra*, and biographical dictionaries, which he refers to as prosopography. For further details about these genres and their relations, see, Chase F. Robinson, *Islamic Historiography* (New York: Cambridge University Press, 2003), pp. 55-74.

of the intellectual trends and social institutions that formed the fabric of the pre-modern Islamic world. For example, Christopher Melchert skillfully employs numerous biographical dictionaries to reconstruct the development and institutional structure of the major schools of law.³⁵ Furthermore, the formulaic nature of this genre has made it fertile ground for statistical and computer-based methods of analysis.³⁶

Biographical dictionaries often portray people in highly formulaic terms.³⁷

Michael Cooperson argues that the biography dictionary schematizes the portrayal of people in order to suggest interchangeability of all members of a group. The interchangeability of all members of a group ensures the continuity of a school's knowledge and authority.³⁸ In the cases of jurists and those who worked within the wider constellation of the Islamic religious sciences, a biographical dictionary demonstrates that a particular group is heir to the Prophet through the group's knowledge.³⁹ Furthermore, although most biographical dictionaries rely upon and cite earlier biographical works

³⁵ Melchert, *Formation*. More generally, Richard Bulliet has used biographical dictionaries to analyze the patterns of conversion and spread of Islam.

³⁶ For an examples of this method of analysis, see, Monique Bernards, "Grammarians' Circles of Learning: Social Network Analysis," in *Abbasid Studies II: Occasional Papers of the School of 'Abbasid Studies Leuven 28 June-1 July 2004*, ed. John Nawas (Leuven: Peeters, 2010), pp. 142-164; Richard Bulliet, *Conversion to Islam in the Medieval Period: An Essay in Quantitative History* (Cambridge: Harvard University Press, 1979).

³⁷ Earlier scholars of Islam and Arabic have claimed these dictionaries for their formulaic style. For an overview of this criticism as it relates to autobiographies, see Dwight Reynolds et. al, *Interpreting the Self: Autobiography in the Arabic Literary Tradition* (Los Angeles: University of California Press, 2001), 20-31. Likewise, Robinson argues that biographical dictionaries attempt to portray someone as a member of group. Robinson, *Historiography*, p. 62

³⁸ Reynolds, *Interpreting*, pp. 40-42; Michael Cooperson, *Classical Arabic Biography: The Heirs of the Prophets in the Age of al-Ma'mūn* (New York: Cambridge University Press, 2000), p. 8.

³⁹ Cooperson, *Biography*, pp. 6-18.

extensively, a sensitive literary analysis of a biographical dictionary often reveals the complex literary techniques that authors shape and redeploy earlier sources in order to support and develop their ideological commitments.⁴⁰

This is not to say that biographical dictionaries do not acknowledge and celebrate exceptional intellects or the differences of opinion among scholars. Each generation has its luminaries who legitimize the continuing relevance and authority of a school or some other group. The exceptional standing of a particular jurist— especially of post-formative jurists—derives from the depth and breadth of his mastery over a body of recognized knowledge, which was at least probabilistic if not certain. Often when discussing a prominent scholar, biographical dictionaries will mention contentious debates about unsettled and complex points of law and theology in which the scholar participated and generally is claimed to have won. The anecdotes about such debates, however, serve to prove the mastery of a scholar over a large and complex body of certain knowledge that he draws upon in order to craft his response to a debated point.

On the other hand, a biographical dictionary may mention variant opinions (*ikhṭilāf*) with respect of a case. However, by not dismissing these variant opinions, the biographical dictionary and school of law accord these variants opinions a certain validity and thus an epistemological status of probabilistic knowledge. Nevertheless, even in this situation, jurists still claim that each case has an objectively correct verdict, which is synonymous with God’s knowledge and will of the law. Ultimately, it is certainty that

⁴⁰ For examples of literary analyses of biographical dictionaries, see Fedwa Malti-Douglas, “Controversy and Its Effects in the Biographical Traditions of al-Khaṭīb al-Baghdādī, in *Studia Islamica* 46 (1977): 115-131; Hilary Kilpatrick, “Time and Death in Compiled *Adāb ‘Biographies,’*” in *Al-Qanṭara* 25, no. 2 (2004): pp. 387-412; Julia Bray, “Literary Approaches to Medieval and Early Modern Arabic Biography,” in *Journal of the Royal Asiatic of Great Britain and Ireland* 20, no. 3 (2010): pp. 237-253.

defines a jurists and school within biographical dictionaries. This certainty in turn legitimizes the authority of jurists within their schools and sometimes also political and judicial authority as we will see below.

a. Ibn Ḥazm

The earliest and most eclectic scholar whose works I will examine in this study is the Andalusian jurist Abū Muḥammad ‘Alī b Aḥmad b. Sa‘īd Ibn Ḥazm (384/994-456/1064). In his *Mu‘jam al-Udabā’*, Yāqūt states that Ibn Ḥazm was as prolific and his interests as varied as those of Abū Ja‘far Muḥammad b. Jarīr al-Ṭabarī (224/839-310/923), the great historian, jurist, and exegete.⁴¹ Besides writing works of law, Ibn Ḥazm wrote works of logic, heresiography, ethics, *belles-lettres*, history, and intrareligious and interreligious polemic.⁴² As a jurist, he started as a Shāfi‘ī jurist, migrated to the Mālikīs, and finally became a Ḍāhirī.⁴³ What it means for Ibn Ḥazm to refer to himself as a Ḍāhirī is ambiguous as I will explain below in more detail.

No less fascinating than his intellectual affiliations are his political affiliations.

Ibn Ḥazm came from a prominent Cordovan family. His father served as the vizier for the

⁴¹ Yāqūt b. ‘Abd Allāh al-Rūmī al-Ḥamawī, *Mu‘jam al-udabā’*, 5 vols. (Beirut: Dār al-Kutub al-‘Ilmiya, 1991), vol. 3, p. 548. For further biographical details on al-Ṭabarī, see EI², s.v. al-Ṭabarī.

⁴² Sa‘īd b. Aḥmad remarks that Ibn Ḥazm’s work on logic, *al-Taqrīb li’l-ḥadd al-manṭiq*, makes mistakes in the presentation of Aristotelian logic due to Ibn Ḥazm’s insistence on discussing legal topics in logic. Abū al-Qāsim Sa‘īd b. Aḥmad, *Ṭabaqāt al-umam*, ed. Maḥmūd ‘Alī Ṣabīḥ (Cairo: al-Maktaba al-Maḥmudīya, 1900), pp. 101-102.

⁴³ Abū ‘Abbās Shams al-Dīn Aḥmad b. Muḥammad b. Khallikān, *Wafayāt al-a‘yān*, ed. Iḥsan ‘Abbās, 8 vols. (Beirut: Dār al-Thaqāfa, 1968), vol. 3, pp. 325-326; Carl Brockelmann, *Geschichte der Arabischen Litteratur*, 2 vols. and supplement (Leiden: E.J. Brill, 1937), sup. 1, pp. 692-694; EI², s.v. Ibn Ḥazm; Yāqūt, *Mu‘jam*, vol. 3, pp. 547-548.

Andalusian Umayyads, but died in one of the court intrigues. Nevertheless, as a young man, Ibn Ḥazm remained an Umayyad loyalist. He joined ‘Abd al-Raḥmān IV al-Murtaḍā (d. 408/ 1017) in Valencia and became his vizier. However, in 409/1019, Ibn Ḥazm was taken prisoner in a battle outside of Granada. He was later released and ‘Abd al-Raḥmān V al-Mustaẓhir (d. 414/1023) appointed him vizier in 414/1023. Roughly seven weeks after this appointment, ‘Abd al-Raḥmān V was assassinated. In 418/1027, Hishām al-Mu‘tadd (r. 418/1027-422/1031) appointed Ibn Ḥazm as vizier.⁴⁴

The intellectual and political interests of Ibn Ḥazm did not form discrete domains. According to the biographical tradition, Ibn Ḥazm enjoyed debating jurists from other schools. Although debates were a common effect of the institutionalization of the schools of law and need to gain patronage, Ibn Ḥazm frequently broke with the spoken and unspoken rules of professional decorum to insult his opponents in the most scurrilous of terms—as one can see in his works of law. His abrasive personality earned him the ire of his opponents and supposedly led to his exile. In 430/1038, Ibn Ḥazm found his way to Majorca where he apparently tried to gain support for his school of law from the local ruler.⁴⁵

b. Bājī

My next jurist, the Mālikī Abū al-Walīd Sulaymān b. Khalaf al-Bājī (403/1012-474/1081), supposedly single-handedly defeated Ibn Ḥazm in several debates that ended

⁴⁴ Ibn Khallikān, *Wafayāt*, vol. 3, pp. 328-329; Brockelmann, *Geschichte*, sup. 1, p. 693; EI², s.v. Ibn Ḥazm; Yāqūt, *Mu‘jam*, vol. 3, p. 547.

⁴⁵ Brockelmann, *Geschichte*, sup. 1, p. 694; EI², s.v. Ibn Ḥazm.

Ibn Ḥazm's plans for an Andalusian Zāhirī school. According to Mālikī biographers, Bājī's performance was so withering that Ibn Ḥazm retired from public life and his books were burnt throughout Andalus.⁴⁶ By the time he retreated to Majorca, however, it seems questionable whether Ibn Ḥazm posed a substantial threat to the Mālikīs of Andalus. Nevertheless, considering how important Ibn Ḥazm's intellectual contributions remained after his death, later Mālikīs may have exaggerated the importance of these debates in order to enhance the prestige of the Mālikī school and of Bājī.

Whatever the case, Bājī came from humble origins in Andalus. At the age of twenty-six, an impoverished Bājī left Andalus for the east where he spent the next thirteen years traveling around the Islamic heartlands. Besides studying with some of the most important Mālikī jurists of the East, he studied with the Shāfi'ī jurist Shīrāzī, whose works I also use in this study.⁴⁷ Although Bājī cites Shīrāzī's views on legal theory, in Bājī's discussions of *gharar*, he does not mention Shāfi'ī views.

During his travels, Bājī was appointed as a judge, or *qāḍī*, of Aleppo. The sources unfortunately do not indicate what happened there and why he returned to Andalus. According to tradition, Bājī returned to Andalus as poor as when he left it. Initially he earned a living hammering gold, but over time his reputation spread among the elites who employed him for diplomatic missions to the various rulers of Andalus. Although biographers state that he became head of the Mālikīs of Andalus and died a wealthy and

⁴⁶ EI², s.v. al-Bājī; Ibrāhīm b. 'Alī b. Farḥūn, *Al-Dībāj al-mudhabbab fī ma'rifat a'yān ulamā' al-madhab*, ed. Ma'mūn b. Muḥyī al-Dīn al-Jannān (Beirut: Dār al-Kutub al-'Ilmīya, 1996), pp. 198-199, no. 240; Muḥammad b. Muḥammad Makhlūf, *Shajarat Al-Nūr al-zakīya fī ṭabaqāt al-mālikīya*, 2 vols. in 1 (Beirut: Dār al-Kitāb al-'Arabī, 1970), vol. 1, pp. 120-121, no. 341.

⁴⁷ EI², s.v. al-Bājī; Ibn Farḥūn, *Dībāj*, p. 197, no. 240; Ibn Makhlūf, *Shajara*, vol. 1, pp. 120-121, no. 341.

famous scholar, he supposedly held judgeships only in small towns.⁴⁸ The insignificance of these judgeships raises questions about the actual political and legal influence that Bājī wielded during his lifetime. It is possible that later biographers embellished their descriptions of him in order to provide a suitable pedigree for one of the most important jurists of the school.

c. Shīrāzī

As mentioned previously, Bājī studied with the eminent Shāfi‘ī jurist, ascetic, and theologian Abū Ishāq Ibrāhīm b. ‘Alī b. Yusūf al-Firūzābādī al-Shīrāzī (393/1003-476/1083). Like Bājī, Shīrāzī came from humble origins, but unlike Bājī, Shīrāzī assuredly became one of the most important jurists of the Shāfi‘ī school during his own lifetime. Shīrāzī was a prolific scholar who wrote some of the most important works to be produced in the Shāfi‘ī school. Besides writing works of *uṣūl al-fiqh* and *fiqh*, he also wrote one of the most important biographical dictionaries of the Shāfi‘īs, a work of dialectics, or *jadāl*, and a work on the disputed points of law, or *ikhtilāf*. This constellation of genres forms the foundation of the scholastic method, which trained jurists to define and defend legal positions of their school.⁴⁹

⁴⁸ EI², s.v. al-Bājī; Ibn Farḥūn, *Dībāj*, p. 198, no. 240; Ibn Khallikān, *Wafayāt*, vol. 3, pp. 328-329; Ibn Makhḷūf, *Shajara*, vol. 1, pp. 120-121, no. 341.

⁴⁹ EI², s.v. al-Shīrāzī; Tāj al-Dīn al-Subkī, *Ṭabaqāt al-Shāfi‘īya al-kubrā*, ed. A.M al-Ḥilw and M.M. al-Ṭinnāhī, 10 vols. (Cairo: Al-Ḥalabī, 1964), vol. 4, pp. 215-229. It is not that surprising that Ibn ‘Aqīl and Shīrāzī have similar literary outputs considering the fact that Shīrāzī was the teacher of Ibn ‘Aqīl and both lived in Baghdad. For further details on scholasticism and its rise in the schools of law, see George Makdisi, *Colleges*, pp. 105-140. For a critique of Makdisi’s theory of role and function of the *madrassa*, see Michael Chamberlain, “Production,” pp. 28-62. For a list of Shīrāzī’s works and a partial chronology of them, see Brockelmann, *Geschichte*, sup. 1, p. 670.

The fact that Shīrāzī devoted so much energy to elaborating and defending the Shāfi‘ī school is unsurprising. The biographical tradition portrays him as one of the most important Shāfi‘ī teachers during his own lifetime. Nizām al-Mulk (d. 485/1092), the famous Saljūqid vizier, built and endowed the Nizāmīya Madrasa in Baghdad specifically for Shīrāzī. Notwithstanding the fact that Shīrāzī initially rejected the appointment, he accepted it in 459/1066 and held the position until his death. Although it is a common *topos* in biographical literature for early jurists to eschew rulers and the entanglements of official appointments, in the case of Shīrāzī this should be taken with a grain of salt. By this period, jurists were judges, courtiers, and their biographers discuss these relationships with rulers in order to illustrate the legitimacy of the school. Indeed, Mathieu Tillier argues that these refusals played an important social role in establishing the independence and legitimacy of a jurist as a judge.⁵⁰ Furthermore, in the case of Shīrāzī, the great Shāfi‘ī biographer Subkī (d. 1370) goes so far as to say that Shīrāzī played a pivotal role in the ascension of the ‘Abbāsīd Caliph al-Muqtaḍī (r. 467-487/1075-1094).⁵¹

d. Ibn Rushd

Abū al-Walīd Muḥammad b. Aḥmad b. Muḥammad b. Rushd al-Ḥafīd (520/1198-595/1261), also called Averroës, is best known in the West for his major contributions to

⁵⁰ Mathieu Tillier, *Les Cadis d’Iraq et l’État Abbasside* (Damascus: Institut Français du Proche-Orient, 2009), pp. 252-282.

⁵¹ EI², s.v. al-Shīrāzī; Subkī, *Ṭabaqāt*, vol. 4, pp. 215-229.

medicine and Aristotelian philosophy.⁵² In addition to being a philosopher, he was an important Mālikī jurist who came from a family of prominent Cordovan jurists. In 1169, through the intercession of Ibn Ṭufayl (d. 581/ 1185-6), the author of the philosophical novel *Ḥayy b. Yaqzān* and court physician of the Almohads, Ibn Rushd obtained an interview with the Almohad ruler Abū Ya‘qūb Yūsuf (r. 558/1163-580/1184).⁵³ This interview blossomed into a long-term relationship between Ibn Rushd and the Almohad ruler, who was interested in philosophy. In 1169, Ibn Rushd was appointed as a *qāḍī* in Seville and in 1171 he became one in Cordoba. In 1182, he succeeded Ibn Ṭufayl as the court physician to Abū Ya‘qūb Yūsuf and later became the Chief Qāḍī of Cordoba.

Notwithstanding this success, in 1195, the Almohad Caliph al-Manṣūr (r. 580-595/1184-1199) denounced the teachings of Ibn Rushd and issued an edict in which he ordered the burning of his books. Ibn Rushd stood trial in Cordoba and was later exiled. Nevertheless, when the Caliph returned to Marrakash, he rescinded this edict and reinstated Ibn Rushd as his personal physician. Ibn Abī Uṣaybi‘a’s entry on Ibn Rushd implies that this incident occurred largely due to a personality conflict between Ibn Rushd and Manṣūr. However, Duncan Macdonald argues that the Caliph turned on Ibn Rushd in order to win the support of the ‘*ulamā*’ of Cordoba while he conducted military

⁵² Interestingly, Ibn Abbār, Makhlūf, and Ibn Farḥūn do not mention Ibn Rushd’s numerous contributions to philosophy. It appears that they tried to suppress these contributions while focusing on his legal and political contributions. According to them, he studied speculative theology, *kalām*. Ibn Farḥūn uses the word *ḥikma* to describe Ibn Rushd in the phrase, “*wa-kāna... ma‘a al-ḥaḏḏ al-wāfir min al-i-rāb wa’l-ādāb wa’l-ḥikma*,” but in this context the phrase probably means he had an ample amount of eloquence, refinement, and wisdom. Ibn Farḥūn, *Dībāj*, pp. 378-379, no. 510; Ibn Makhlūf, *Shajara*, vol. 1, pp. 146-147, no. 439; Muḥammad b. ‘Abd Allāh b. al-Abbār, *Kitāb al-Takmila li-kitāb al-ṣila*, 2 vols. (Madrid: Bibliotheca Arabico-Hispana, 1886), vol. 1, pp. 269-271, no. 853.

⁵³ EI², s.v. Ibn Ṭufayl.

operations against the Christian kingdoms of the Iberian Peninsula.⁵⁴ If Macdonald is correct, it appears that the biographers and historians suppressed the political reasons behind this event and focused on Ibn Rushd's personality and orthodox contributions to religious scholarship. Whatever the case may be, Ibn Rushd's career reflects another important union between political and religious authority.

e. Sarakhsī

Muḥammad b. Aḥmad b. Abī Sahl Abū Bakr al-Sarakhsī (d. 483/1090) was a Central Asian Ḥanafī jurist who is equally enigmatic to both his school and modern historians of Islamic law. Notwithstanding the importance of his works of law, the school knew little about his personal life. The lacuna is so great that the biographer Qurashī (696/1297-775/1373) reconstructs Sarakhsī's life on the basis of autobiographical remarks that Sarakhsī makes in his works.⁵⁵

His relationship with the ruling elite may explain the lacuna in the biographical information about him. Unlike the previously mentioned scholars who had generally wielded political authority and had cordial relationships with the ruling elite, Sarakhsī spent ten years in the prison of the Qarakhānids in Uzjand. According to Ibn Quṭlūbughā, Sarakhsī was imprisoned after he refused to recognize the legitimacy of the marriage of

⁵⁴ Aḥmad b. al-Qāsim b. Abī Uṣaybi'a, *'Uyūn al-anbā' fī ṭabaqāt al-aṭibbā'* (Beirut: Manshūrāt Dār Maktabat al-Ḥayā, 1965), pp. 531-532; Duncan Macdonald, *Development of Muslim Theology, Jurisprudence, and Constitutional Theory* (New York: Charles Scribner's Sons, 1903), pp. 255-256. For a list of his works, see Brockelmann, *Geschichte*, sup. 1, pp. 833-836

⁵⁵ 'Abd al-Qādir b. Muḥammad Qurashī, *Al-Jawāhir al-muḍīya fī ṭabaqāt al-ḥanafīya*, 2 vols. (Hayderabad: Majlis Dā'irat al-Ma'ārif al-Nizāmīya, 1914), vol. 2, pp. 28-29, no. 85; EI², s.v. Sarakhsī. For further biographical details, see EI², s.v. Abd al-Qādir al-Qurashī.

Qarakhānid Khaqān who had married his manumitted *umm al-walad* without observing the ‘*idda*.⁵⁶ Nevertheless, during his incarceration, Sarakhsī managed to compose the *Mabsūṭ*, his massive “expansive” commentary on the *fiqh* of the eponym of the Ḥanafī school and his students. Supposedly, Sarakhsī’s students smuggled the work out.⁵⁷ After he was released from prison, he spent the rest of his life in Farghāna at the court of Amīr Ḥasan with whom he enjoyed a more amicable relationship.⁵⁸

f. Ibn Qudāma

The final jurist whose writing I will analyze in this study is the prominent Ḥanbalī Muwaffaq al-Dīn Abū Muḥammad ‘Abd Allāh b. Aḥmad b. Qudāma al-Maqdisī (541/1147-620/1223). He was born near Jerusalem and spent the majority of his life in Damascus. Unlike our other famous jurists, who often interacted with the ruling elite and

⁵⁶ An *umm al-walad* is a concubine who has given birth to the child of her owner. According to all of the law schools, neither she nor the child can be sold if the owner legally acknowledges his paternity of the child. Upon the death of her master, the concubine gains her freedom and the child is always considered a free and full heir to his or her father. For further details, see EI², s.v. *umm al-walad*. The ‘*idda* is a period of seclusion a female must observe before a divorce or sale of a concubine takes affect. The purpose of the waiting period is to determine if she is pregnant. The period of time is regulated by variety of complex rules. For further details, see EI², s.v. ‘*idda*.

⁵⁷ EI², s.v. Sarakhsī; al-Qāsim b. ‘Abd Allāh b. Quṭlūbughā, *Tāj al-tarājim*, (Baghdad: Maṭba‘at al-Ma‘ānī, 1962), pp. 52-53, no. 157.

⁵⁸ EI², s.v. Sarakhsī; Ibn Quṭlūbughā, *Tāj*, p. 52, no. 157; Muḥammad ‘Abd al-Ḥayy al-Laknawī, *Al-Fawā'id al-bahīya fī tarājim al-ḥanaḥīya*, ed. Aḥmad al-Zu‘bī (Beirut: Dār al-Arqam, 1998), pp. 261-262, no. 328. The ruler is most likely Ḥasan b. ‘Alī who ruled some time during the latter half of the eleventh century to the early part of the twelfth century. For a brief outline of the Qarakhānid rulers and their different centers of power, see Clifford Edmund Bosworth, *The New Islamic Dynasties* (New York: Columbia University Press, 1996), no. 90, pp. 181-184.

enjoyed official appointments, Ibn Qudāma appears to have avoided such overt political and judicial entanglements.

Nevertheless, Ibn Rajab's (d. 795/1392) biography of Ibn Qudāma paints a picture of a jurist who commanded an immense amount of respect in Damascus due to his reputation for exceptional learning and asceticism.⁵⁹ While in Baghdad, he studied with 'Abd al-Qādir al-Jilānī (470-561/ 1077-1166) who founded the Qādirīya Sufi order.⁶⁰ While with Jilānī, Ibn Qudāma started to study the legal compendium of the Ḥanbalī jurist al-Khiraqī (d. 334/945), upon which he would later write his famous legal commentary.⁶¹ Ultimately, Ibn Rajab's portrayal indicates that Ibn Qudāma's legitimacy and authority stemmed from his ability to combine his exceptional legal knowledge and asceticism with a fair level of respect for Sufism. During this period in the Islamic world, other jurists commonly combined legal erudition with Sufism.⁶² Thus, Ibn Qudāma is representative of wider notions of piety and legitimacy among the scholarly elite of this period.

⁵⁹ Abd al-Raḥmān b. Aḥmād b. Rajab was Ḥanbalī jurist whose biographical dictionary is a continuation of Ibn Abī Ya'la's. For further biographical details, see EI², s.v. Ibn Radjab.

⁶⁰ For further biographical information, see EI², s.v. 'Abd al-Qādir al-Djilānī.

⁶¹ Studied under the sons of Ibn Ḥanbal and was instrumental in the institutionalization of the school. For further details, see Fuat Sezgin, *Geschichte des Arabischen Schrifttums* (Leiden: E.J. Brill, 1967), bd. 1, pp. 512-513, no. 11.

⁶² 'Abd al-Raḥmān b. Aḥmād b. Rajab, *Kitāb al-Dhayl 'ala ṭabaqāt al-ḥanābila*, 2 vols. (Cairo: Maṭba'at al-Sunna al-Muḥammadiya, 1953), vol. 2, pp. 133-149, no. 272; Brockelmann, *Geschichte*, sup. 1, pp. 688-689; EI², s.v. Ibn Qudāma al-Maḥdīsī; Henri Laoust, *Le Précis de Droit d'Ibn Qudāma* (Beirut: Institut Français de Damas, 1950), pp. ix-lviii. For further information on the relationship between Sufism and Islamic law, see David Powers, *Law, Society, and Culture in the Maghrib, 1300-1500* (New York: Cambridge University Press, 2002), pp. 15-17, 167-205; Vincent Cornell, *Realm of the Saint: Power and Authority in Moroccan Sufism* (Austin: University of Texas Press, 1998).

III. Continuity and Uncertainty

The previous section employed biographical dictionaries to contextualize the jurists examined in this study. As stated above, this genre has a formulaic style in order to demonstrate the continuity of the school's mastery over a body of at least probabilistic if not certain knowledge. In biographical dictionaries knowledge and more specifically certainty are both the starting and end points for the construction of the identity of jurists. Even anecdotes about great scholars who were indolent or forgetful students in their adolescences affirm the ability of the school to make great scholars out of the seemingly most unassuming of people. In the case of the wayward youth, it is the truth of the school's knowledge that makes his formation into a great scholar possible. After all, one cannot hope to make a great scholar from uncertainty and errors.⁶³

This genre's portrayal of knowledge implicitly rests on the following three traits:

1) the organic unity of Arabic creates a stable relationship between words and their meanings; 2) the subject knows this unity such that he or she has mastery over it so that there is no ambiguity in his use or interpretation of Arabic; and 3) history occurs only when both the meaning and the subject change. According to these premises, knowledge has fixed and stable form that enables its repetition, whereas change and difference are the mark of uncertainty, the inessential, and error. These premises ensure not merely that a fixed relationship exists between words and their meanings, but also that the meanings of words are fixed and discrete. True, a word without a context may possess several meanings, but the perfect subject can determine the intended and thus singularly correct interpretation of a word within a statement on the basis of number of hermeneutic tools.

⁶³ For an analysis of this topos in autobiographies, see, Reynolds, *Interpreting*, pp. 81-87.

Given these premises, scholars can move seamlessly from one discourse to another while always claiming to find the one objectively correct meaning. Although Julia Kristeva outlines these traits with respect to the earliest works of European philology, these traits also inform the narrative structure of these biographical dictionaries.⁶⁴

For the biographical dictionary, the knowledge that jurists possess must be objective and enduring truth. Both Muslim and Western scholars frequently cite the famous *ḥadīth* that, “Each *mujtahid* gets one reward and each correct *mujtahid* gets two rewards,” as an endorsement of legal interpretation, but in fact, this *ḥadīth* does not give an unrestricted endorsement for interpretation. Rather, it indicates that all interpretation must seek to obtain the objectively correct answers. True, jurists acknowledge that words and phrases may at first glance seem ambiguous notwithstanding the fact that each word has conventional meanings.⁶⁵ Nevertheless, they claim that the speaker intends a meaning that the listener or reader can often if not always obtain on the basis of contextual indicators. The stability of meaning makes knowledge a fixed point that stands above the effects of form and can be transferred from one field and integrated into another so as to form a unity. This unity explains both the importance and ability of jurists to claim that they had mastery over so many fields of learning, which form parts of a much larger unity.

⁶⁴ Julia Kristeva, “From One Identity to an Other,” *Desire in Language: A Semiotic Approach to Literature and Art*, tr. Thomas Gora, Alice Jardine, and Leon S. Roudiez (New York: Columbia Press, 1980), 126-127.

⁶⁵ Muslims scholars agree that words have conventional meanings in what they refer to as *wadʿ*, but they disagree about whether God or humans created these conventions. For discussions of conventional meanings and interpretation in Arabic, see, Bernard Weiss, “Language in Orthodox Muslim Thought: A Study of “Wadʿ al-Lughah” and its Development,” (Ph.D. diss., Princeton University, 1966); Mohamed M. Yunis Ali, *Medieval Islamic Pragmatics* (Richmond: Curzon, 2000), esp. pp. 15-37.

The meanings that engender knowledge require a special vessel to bear them. The jurists – especially the exceptional ones–whom biographical dictionaries mention are the bearers of this knowledge through their command of the stable relationship between word and meaning. This conception of knowledge as encapsulated and transmitted in stable meanings so that jurists can act as faithful transmitters of the knowledge of the earliest scholars and more importantly of the Prophet. Admittedly, one finds some biographical dictionaries and jurists claim that a qualitative and quantitative decline had occurred in legal thought. Nevertheless, these remarks still presume that certainty has an objective and stable existence that transcends human failings.⁶⁶ These qualities ensure a stable reference point against which to array terms like objective, subjective, certainty, uncertainty, correct, and incorrect. In turn, the distribution of these terms becomes a powerful tool that legitimizes the institutional authority of jurists.

However, jurists also contextualize their knowledge, intellectual output, and schools' in their own works of law. To be sure, modern Western scholars of Islamic law have used works of *uṣūl al-fiqh* and *fiqh* to examine how jurists depict their relations to their schools of law. Nevertheless, most modern Western scholars of Islamic law frame this relationship as one of the repetition of certain knowledge by invoking the terms *ijtihād* and *taqlīd*. In many ways, the binary of *ijtihād* and *taqlīd* relies on and affirms the

⁶⁶ In his thought provoking study of the biographical dictionary of the Shāfi'ī jurist Ibn Qāḍī Shuhba (d. 851/1448), R Kevin Jacques states that knowledge has an objective existence for Muslim jurists since it is really God's knowledge that jurists are attempting obtain when they derive law. Notwithstanding his occasional comments to the contrary, Jacques adopts a similar position that knowledge and more specifically words have stable meanings. This position enables him to suppress any development or ambiguity in the meaning of terms that form the basis of his statistical analysis. R. Kevin Jacques, *Authority, Conflict, and Transmissions of Diversity in Medieval Islamic Law* (Boston: Brill, 2006), pp. 89-90, 120-122, 152-152.

philological conception of knowledge. According to the standard narrative of the development of Islamic held by modern Western scholars, Islamic jurists had a relatively short burst of intellectual creativity when they employed *ijtihād*, or their legal reasoning, to confront the sources of law and derive laws seemingly *ex nihilo*. Later jurists employed *taqlīd*, or submitted to the authority of earlier jurists. With *taqlīd*, Islamic law entered a phase of intellectual stasis when jurists transmitted a corpus of certain or at least probabilistic knowledge.⁶⁷

Although one finds this narrative in works of Islamic law, Western scholars have enthusiastically adopted it in order to detail the development and role of Islamic law in society.⁶⁸ In a number of recent articles, several scholars have attempted to rehabilitate the portrayal of *taqlīd* by arguing that it ensures the stability and commensurability of all works of law within the bounds of a given school of law.⁶⁹ This approach has the

⁶⁷ For examples of this narrative, see A.S. Tritton, *Materials on Muslim Education in the Middle Ages* (London: Luzaz & Co. Ltd., 1957), p. 163; Coulson, *History*, pp. 75-85; H.A.R. Gibb, *Mohammedanism: An Historical Survey* (New York: Oxford University Press, 1962), pp. 98-104; Norman Anderson, *Law Reform in the Muslim World* (London: Athlone Press, 1976), p. 7. Schacht, *An Introduction*, pp. 69-75; N.J.

⁶⁸ There are some notable exceptions to this generalization. Jonathan Brockopp examines the discursive techniques that early Mālikī legal texts employ to suggest that all law derives from Mālik in what Brockopp refers to as the “Great Shaykh,” theory of law. Jonathan Brockopp, “Competing Theories of Authority in Early Mālikī Texts,” in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Boston: Brill, 2002), pp. 3-22. David Powers analyzes the techniques that *mufītīs* employ to construct their authority and situate the litigants. David Powers, *Law, Society, and Culture in the Maghrib, 1300-1500* (New York: Cambridge University Press, 2002), pp. 167-205. A number of scholars have shown the important discursive differences among works of *uṣūl al-fiqh* that thereby draw into question a linear relationship between formative and post-formative law. For examples, see David R. Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Theorists Imagined a Revealed Law* (Ann Arbor, Mich.: American Oriental Society, 2010); Lowry, *Theory*, pp. 359-368.

⁶⁹ Admittedly and somewhat inevitably, I have condensed a number of complex analyses on the topic. For further details, see Ahmed al-Shamsy, “Rethinking *Taqlīd* in the Early Shāfi‘ī School,” *Journal of the American Oriental Society* 128, no. 1 (2008): pp. 1-23; Mohammed

advantage of relating the discursive practices of jurists to non-discursive issues of institutional authority. On the other hand, Wael Hallaq argues for the continuous development of Islamic law.⁷⁰ Nevertheless, he limits any development to the application of *qiyās* to solve a small number of “new” cases, which jurists added to a stable “canon” of accepted law.⁷¹ Ultimately, he has not strayed far from the philological suppositions that he criticizes so vigorously.⁷²

This conception tends to downplay differences among jurists as insignificant issues of form or style. Indeed, this conception of form and content allows scholars to mine a work of law for “facts” and project these facts on a group of jurists as their unchanging conception of law. However, this static conception of knowledge in biographical dictionaries and earlier Western scholarship fails to explain the causes and contours of intellectual production. If all sources simply repeat the already said, it is

Fadel, “The Social Logic of *Taqīd* and the Rise of the *Mukhtaṣar*,” *Islamic Law and Society* 3, no. 2 (1996): pp. 193-233; Sherman Jackson, “*Taqīd*, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory *Muṭlaq* and ‘*Āmm* in the Jurisprudence of the Shihāb al-Dīn al-Qarāfī,” *Islamic Law and Society* 3, no. 2 (1996): 165-192.

⁷⁰ Wael Hallaq, “Was the Gate of *Ijtihād* Closed,” *The International Journal of Middle East Studies* 16, no. 1 (March 1984): pp. 3-41. In fact, this article inaugurated a series of seminal articles that Hallaq wrote to show the creativity of Islamic law and interconnected relationship between different genres of legal literature. See Hallaq, “From *Fatwās* to *Furū*’, Growth and Change in Islamic Substantive Law,” *Islamic Law and Society* 1, no. 1 (1994): pp. 29-65; Hallaq, “Model *Shurūṭ* Works and the Dialectic of Doctrine and Practice,” *Islamic Law and Society* 2, no. 2 (1995):109-134.

⁷¹ Hallaq, “*Fatwās*,” 39, 51-52. For a critique of Hallaq’s understanding of *ijtihād*, method of diachronic analysis, and the aforementioned articles, see Norman Calder, “Al-Nawawī’s Typology of Muftis and Its Significance for a General Theory of Islamic Law,” *Islamic Law and Society* 3, no. 2 (1996): pp. 157-162.

⁷² For a more general analysis of this phenomenon in Hallaq’s research, see David S. Powers, “Wael B. Hallaq on the Origins of Islamic Law: A Review Essay,” *Islamic Law and Society* 17, no 1 (2010): 126-157.

unclear why people would continue to write new works. The typical answer that Western scholars of Islamic law give to this question argues that later works like digests and commentaries merely refine the technical vocabulary and organization of previous works.

Although there are undoubtedly changes and refinements in later works, this view fails to explain nearly a thousand years of intellectual production by thousands of scholars. Either the earliest works were so muddled that they required such a huge amount of labor, or the idea of updating earlier works through a system of editions never occurred to anyone. The explanation that piety motivated scholars to keep writing is even worse since it is a blackbox that treats piety as a monolithic force in Islamic thought and life.

Not surprisingly, contemporary Western scholars of Arabic literature have been the first to reassess the relationship between form and content in the Islamic and Arabic intellectual traditions when it comes to production and reception of commentaries and digests.⁷³ Beyond the biographical dictionaries and narratives about *ijtihād* and *taqlīd*, jurists describe their intellectual production in ways that suggest a more dynamic conception and role for certainty and uncertainty. To be precise, the jurists examined in this study make statements that break with the three features of knowledge that Kristeva outlines with respect to philology: 1) the organic unity of language articulated through the stable relationship between words and meanings; 2) the perfect subject who bears this unity; and 3) the lack of historical development. This break suggests a less stable

⁷³ For examples, see Kelly Tuttle, “Expansion and Digression: A Study in Mamlūk Literary Commentary.” (Ph.D. Diss., University of Pennsylvania, 2013); Bauer, “Mamluk,” pp. 112-116. Julia Bray criticizes scholars who ignore issues of literary form and its relation to content miss a great deal of the significance of the text. Bray, “Approaches,” pp. 243-244.

conception of the meanings that engender knowledge. Consequently, the distinction between form and content becomes less stable.

The break with these philological premises opens jurists and their intellectual production to two forms of uncertainty. The first form, which is generally how people think of uncertainty, arises from a naïveté or a momentary error. This form of uncertainty functions as starting point for the acquisition of the forms of certainty that ultimately validate the writing of works of law or the authority of a school of law. The second form of uncertainty that arises from rejecting these aforementioned philological premises reflects a systemic and irresolvable instability in communication.

Although the two forms of uncertainty have different functions and causes, they both operate at different discursive levels. More importantly, these two forms of uncertainty provide the impetus and justification in the eyes of jurists for their continued intellectual production. Finally, much like *gharar* as we will see in the following chapters, the uncertainty that structures works of law is not a given, but something that knowledge creates. Below, I will analyze the statements that jurists make that draw into question the stability of meaning at the level of genres, legal opinions, and finally individual words.

a. The Commensurability of Meaning at the Level of Genre

According to the standard narrative about the development of Islamic law and the distinction between *ijtihād* and *taqlīd*, knowledge is contingent upon meaning being stable and transparent across time and space. Language can convey meaning in a number

of ways, but these ways must be essentially equivalent.⁷⁴ The jurists examined in this study certainly hold this position when they divide language into words and meanings. Nevertheless, scattered throughout their writings, they point to the instability of this division in important ways that open the intellectual tradition to interpretation and disagreement.

Starting at the level of genres, the jurists examined in this study employ several different genres. Ibn Qudāma, Shīrāzī, Bājī, Ibn Ḥazm, and Sarakhsī write either commentaries (*sharḥ*) or digests (*mukhtaṣar*) on earlier works of law. Shīrāzī states without much ado in the introduction to the *Muhadhdhab* that his work presents “the principles of the Shāfi‘ī school with their proofs and the problematic cases with their policy reasons that derive from these principles.”⁷⁵ Sarakhsī’s work is a commentary on the digest by Muḥammad b. Muḥammad al-Marwazī (d. 334/945) on the works of Shaybānī (132-189/750-805).⁷⁶ Ibn Qudāma’s work is a commentary on the digest by Abū Qāsim ‘Umar b. al-Ḥusayn b. ‘Abd Allāh al-Khiraqī of the legal views of Aḥmad Ibn Ḥanbal (164-241/780-855).⁷⁷ Both Ibn Ḥazm and Bājī frame their works as digests of

⁷⁴ The major exception to this claim is the view that the Qur’ān cannot be translated. Nevertheless, Muslims did think that its meaning could be explained and commented upon, which requires words to have commensurable and stable meanings.

⁷⁵ Abū Ishāq Ibrāhīm al-Shīrāzī, *Al-Muhadhdhab fī fiqh al-imām al-Shāfi‘ī*, ed. Muḥammad al-Zuḥaylī, 6 vols. (Damascus: Dār al-Qalam, 1992), vol. 1, p. 38.

⁷⁶ Muḥammad b. Aḥmad al-Sarakhsī, *Kitāb al-Mabsūṭ*, 30 vols. in 10 (Cairo: Maṭba‘at al-Sa‘āda, 1906-1913), vol. 1:1, pp. 2-4. Abū Abd Allāh Muḥammad b. al-Ḥasan was a student Abū Ḥanifā and one of the early founders of the Ḥanafī school. For further biographical details, see EI², s.v. Muḥammad al-Shaybānī.

⁷⁷ ‘Abd Allāh b. Aḥmad b. Muḥammad b. Qudāma, *Al-Mughnī*. ed. Ṭaha Muḥammad al-Zaynī. 10 vols. (Cairo: Maktabat al-Qāhira, 1968), vol. 1, p. 3-6. Aḥmad b. Ḥanbal is the eponym of the Ḥanbalī school. Although he did not write a work of *fiqh*, he is best known for his *Musnad*,

previous works that they wrote themselves. In the case of Bājī, his work is a digest of his *Istīfā'*, which is a commentary on the *Muwattā'* of Mālik (d. 179/795).⁷⁸ As for Ibn Ḥazm, one of the last Zāhirīs, he claims that his *Muḥallā* is a digest of his earlier work, the *Mujallā*.⁷⁹ With the exception of Ibn Ḥazm whom I will discuss in more detail below, the other jurists examined here thus frame their works as a continuation of their schools' legal tradition notwithstanding the different genres that they employ. To be precise, they frame their words as commentaries and digests of earlier important works of law in their respective schools of law.

Finally, Ibn Rushd frames his work as a study of the legal disagreements among the major schools of law.⁸⁰ Although works of *khilāf*, or disputed legal points, are common, Ibn Rushd's work is not an example of this genre. Typically, a jurist uses this genre to champion his school's positions while pointing out the inconsistencies of other schools. However, Ibn Rushd's work neither stridently defends the Mālikī school nor champions a grand synthesis of the other schools.⁸¹ Ibn Rushd generally cites the opinion

a collection of Prophetic *ḥadīth*. For further biographical details, see EI², s.v. Aḥmad al-Ḥanbal; Cooperson, *Biography*, pp. 107-153.

⁷⁸ Abū al-Walīd Sulaymān b. Khalaf al-Bājī, *Al-Muntaqā: sharḥ Muwaṭṭa' Mālik*. ed. Muḥammad 'Abd al-Qādir Aḥmad 'Atā. 9 vols. (Beirut: Dār al-Kutub al-'Ilmīya, 1996) vol. 1, pp. 201-202. Mālik b. Anas was the eponym of the Mālikīs and best known for his *Muwaṭṭa'*, an important collection of early traditions, which his students transmitted in several recensions. For further biographical details, see EI², s.v. Mālik b. Anas.

⁷⁹ 'Alī b. Aḥmad b. Sa'īd b. Ḥazm, *Muḥallā*. ed. Muḥammad Munīr al-Dimashqī. 11 vols. (Cairo: Idārat al-Ṭibā'a al-Munīra, 1928), vol. 1, p. 2.

⁸⁰ Abū al-Walīd Muḥammad b. Aḥmad b. Muḥammad b. Aḥmad b. Rushd, *Bidāyat al-mujtahid wa-nihāyāt al-muqtaṣid*, ed. Mājīd al-Ḥamawī, 4 vols (Beirut: Dār Ibn Ḥazm, 1995), vol. 1, p. 15.

⁸¹ Maribel Fiero argues that this work was an attempt to synthesize the views of the major schools and relativize the authority of the Mālikīs so that the Almohad Caliph could make a final

of Mālik and his early students. When he cites the views of other schools he typically sides with the Mālikī view on cases.

Generally, both pre-modern Muslim jurists and modern Western scholars of Islamic law distinguish between the form and content of works. Both groups of scholars value the content over the form since content is supposed to be stable and ensures the commensurability of different texts and genres. Indeed, the conceptual distinction between form and content must be stable for Bājī and Ibn Qudāma to able to affirm that both the digest and commentary are equivalent in terms of the content.⁸² Regardless of what work one reads from a given school, the same content conveys the essence of the school. This means that only the meaningless differentiates these genres. Or to put it differently, whatever is added or subtracted from these works does not affect their meaning.

However, a brief analysis of other areas of Islamic learning and the statements of jurists themselves suggest a more complex picture in which form and content are neither stable nor clearly differentiated. In the introduction to his *al-Taqrīb li-ḥadd al-manṭiq*, a work of logic, Ibn Ḥazm presents the following typology of genres:

The previously mentioned types of books are only seven:

1. Something (*shay'*) no one has previously deduced (*istikhrājihi*) so we do,
2. Something that was incomplete so we complete it,
3. Something that was wrong so we correct it,
4. Something that was obscure so we comment on it,

selection on disputed points of law. Unfortunately, Fiero provides very little textual evidence to support this argument. For the most part, Ibn Rushd focuses on Mālikī and his early students. Maribel Fiero, "The Legal Policies of the Almohad Caliphs and Ibn Rushd's *Bidayāt al-Mujtahid*," *Journal of Islamic Studies* 10, no. 3 (1999), pp. 226-248.

⁸² Bājī, *Muntaqā*, vol. 1, pp. 201-202; Ibn Qudāma, *Mughnī*, vol. 1, p. 6.

5. Something that was prolix so we abridge it without removing any of its intended message (*bi-gharadīhi*),
6. Something that was dispersed so we gather it, and
7. Something that was poorly organized so we properly organize it.⁸³

Although the term “something” links each category, Ibn Ḥazm does not use the word “something” in its pregnant philosophical sense to mean the most general ontological category that subsumes all other existents. Rather, only the word “*gharad*”, or the intended message, in the fifth category, suggests that the content of the work is a stable referent that links each genre.

The distinction between genres is, however, not purely one of content. Ibn Ḥazm remarks that the value of each work depends on its presentation of a given topic. A book that presents one topic better than previous works would thus be a meaningful contribution. On the other hand, a work that fails to improve the arrangement of material, removes necessary material, adds unnecessary material, or does not improve the wording performs an intellectual disservice.⁸⁴ Form and content thus both determine the value of books in such a manner that the content cannot simply exist in a disembodied form notwithstanding his earlier comments to this effect. Indeed, form modifies content either for the better or worse.

With respect to works of law, Ibn Ḥazm, Bājī, and Ibn Qudāma elaborate on this insight when they distinguish between the form and content digests and commentaries in terms of their functions and audiences. The digest eases the memorization and study of law for young students whereas the commentary facilitates the increased understanding

⁸³ Ibn Ḥazm, *Taqrīb*, p. 16.

⁸⁴ Ibn Ḥazm, *Taqrīb*, 16.

for more advanced students and full-fledged jurists. The digest eliminates *isnāds*, which are the chain of transmitters of a specific *ḥadīth*, and proofs for legal positions—especially those positions attributed to opponents of the school. It also reduces the number of cases examined and overall wording.⁸⁵ On the other hand, the commentary employs contrary operations.

Although jurists claim that a digest may excise the *isnād* without excising meaning, one needs to look no further than the adjacent fields of *ḥadīth* criticism and *uṣūl al-fiqh* where scholars invest the *isnād* with a great deal of epistemological import. In works of *fiqh*, jurists may, however, denude it of significance. In fact, in the field of *fiqh*, the *isnād* is not entirely insignificant since jurists often use it to dismiss a position with which they disagree. The significance of the *isnād* is thus not a platonic ideal. Rather, discursive and non-discursive practices configure the canons of significance and insignificance.

In the case of the *isnād*, several discursive techniques and institutional apparatuses enable authors to modulate the significance of the *isnād* in works of law. In particular, the canonical collections of *ḥadīth* allow jurists to forgo an examination of the *isnād*. It suffices to promise that all of the *ḥadīths* employed are *ṣaḥīḥ*.⁸⁶ However, works of *fiqh* implicitly recognize its significance in the field of *ḥadīth* criticism and *uṣūl al-fiqh*. Ultimately, this brief discussion indicates the complex way that different genres—

⁸⁵ Bājī, *Muntaqā*, vol. 1, pp. 201-202; Ibn Ḥazm, *Muḥallā*, vol. 1, p. 2; Ibn Qudāma, *Mughnī*, vol. 1, pp. 3-6.

⁸⁶ For example, in the introduction to his work, Ibn Ḥazm promises to use only these sound *ḥadīth*. Ibn Ḥazm, *Muḥallā*, vol. 1, p. 2.

no matter how closely aligned they may be otherwise—configure the boundaries of significance in different ways.

At the level of genre, the relationship between form and content is unstable due to the dialectical relationship between these two concepts. Not only do form and content interact in such way that it may be practically difficult to differentiate between these aspects of a legal text, but the significance of form and content changes in works of law depending on the audience of a genre. To write a commentary on a digest or vice-versa is not merely an act of repetition aimed at elucidating the law, but also an act of interpretive creation. True, a new work may elucidate problems found in the previous work, but the new work will also give rise to new points of uncertainty for other readers precisely because of the unstable interaction and division between form and content.

b. The Commensurability of Meaning at the Level of Legal Opinion

Although it is somewhat easy to accept that different genres configure the boundaries of meaning differently, yet it might be supposed that a legal position should at least provide a more stable utterance upon which issues of generic form and content should not impinge. Nevertheless, Bājī remarks that,

I discussed in my aforementioned book, the *Istīfā'*, what I do not discuss one iota of in this book. This is that the *fatwās* of a *muftī* about cases along with his statements and comments about these cases are only in accordance with the success and succor that God grants him. Thus, one may hold that a particular opinion is correct one time and incorrect another time. Due to this, the opinion of the same jurist may differ with respect to the same case!⁸⁷

⁸⁷ Bājī, *Muntaqā*, vol. 1, p. 202

In terms of the elaboration of law, the same jurist may have different or even contradictory opinions on the same case. Thus, a jurist who writes both a commentary and a digest, like Bājī and Ibn Ḥazm, does not necessarily provide a consistent legal viewpoint on a case. In fact, the inconsistencies of opinions from the same or different jurists regarding the same case led in part to the development of the *furūq* genre, or subtle legal distinctions.⁸⁸

The study of *gharar* reveals that a jurist handles the different views attributed to jurists or even the same jurist through two contrary techniques: 1) he limits the differences and selects one answer as the correct opinion, or 2) he reifies these differences among the competing opinions. For the first approach, a jurist indicates that one opinion is correct. In this case, the other opinions might simply be mentioned as way to explicitly record them as incorrect so that later jurists do not resurrect them as potentially valid solutions to the case.

The second approach for dealing with different legal views regarding the same case takes variety of forms. On the one hand, a jurist may simply allow the different positions to remain without indicating his preference for a particular opinion. Authors of post-formative works of law regularly compile the contrary opinions regarding that were often diffused among several early sources. True, an author may compile these different opinions in order that future jurists may have different options to select from with respect

⁸⁸ For example, Juwaynī notes in the introduction to his *al-Jam‘ wa’l-farq*, one of the earliest works of *furūq*, “Often legal cases have the same form (*suwar*), but their legal rulings differ due to legal causes that necessitate the different legal rulings.” He then goes on to discuss the forms of these different rulings and their sources. Abū Muḥammad ‘Abd Allāh al-Juwaynī, *Al-Jam‘ wa’l-farq*, ed. al-Raḥmān b Salama b. ‘Abd Allāh, 3 vols. (Cairo: Dār al-Jīl, 2004), vol. 1, pp. 37-50.

to the same case or similar cases. However, by allowing these contrary opinions to remain as equally valid, the author also intentionally leaves a source of potential uncertainty for future jurists who are seeking a univocal position with respect to a case.

On the other hand, he may contextualize and distinguish each position in order suggest that each one corresponds to a different case. For this approach, he uses different hermeneutic techniques to contextualize these seemingly contradictory positions. In essence, this approach reverse engineers a case for a given position and then back-projects a historical pedigree onto the case and legal position.

c. The Commensurability of Meaning at the Level of the Word

It is easy to view the uncertainty that Bājī claims to face as the typical pious posturing that scholars engage in so as to validate their writings. One should not be so quick to dismiss these statements. Although Bājī attributes the differences and inconsistencies in the thought of jurists to the hand of providence, Ibn Rushd attributes the differences and inconsistencies to the ambiguity inherent in language at the level of the word. In the introduction to the *Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid*, Ibn Rushd presents six causes for disagreement in cases of law, which can be summarized as follows:

1. Ambiguity as to whether the word's meaning is restricted or not (*'amm/khaṣṣ*),
2. The word or phrase is a homonym (*ishtirāk*),
3. There is disagreement about the syntax (*i'rāb*),
4. The word may be literal or figurative (*ḥaqīqa/majāz*),
5. The word may be qualified or not (*muṭlaq/muqayyad*),
6. Contradictions that arise due the aforementioned causes when two statements of a law are compared.⁸⁹

⁸⁹ Abū al-Walīd Muḥammad b. Aḥmad b. Rushd, *Bidāya*, vol. 1, pp. 15-16.

This list indicates that differences inevitably arise due to uncertainty about the comprehension and extension of words.⁹⁰

For jurists, knowledge must stand above the effects of language usage if it is to be objective, stable, and commensurable across time and different discourses. The statements of an average person may be inherently ambiguous due to the speaker's lack of mastery of Arabic. However, the statements of God and the Prophet are presumed to reflect an intended and thus objectively correct meaning, which jurists claim to be able to recover. True, Muslim scholars recognized that even the speech of God and the Prophet often presented ambiguities on an initial reading. In fact, jurists argued for the ambiguity of words to legitimize their interpretive activity.⁹¹ However, even these jurists were still openly committed to the claim that statements of God and the Prophet have objectively correct and stable interpretations that they could find by the application of the hermeneutic techniques outlined in works *uṣūl al-fiqh*.

Nevertheless, Ibn Qudāma in his *Rawḍat al-nāẓir wa-jannat al-munāẓir fī uṣūl al-fiqh*, a work of *uṣūl al-fiqh*, undermines the ability to obtain the objectively correct

⁹⁰ In his study of Arabic grammar, Sībawayh (d. ca. 180/796) distinguishes between word and meaning, and he remarks that the interaction between these elements can give rise to homonyms, synonyms, and antonyms. 'Amr b. Uthmān Sībawayh, *Al-Kitāb*, ed. Imīl Badī' Ya'qūb, 5 vols. (Beirut: Dār al-Kutub al-'Ilmīya, 1999), vol. 1, p. 49. For biographical details on Sībawayh, see, Michael Carter, "Sībawayhi," in *Dictionary of Literary Biography: Arabic Literary Culture, 500-925*, ed. Shawkat Toorawa and Michael Cooperson (Detroit: Thomson Gale, 2005), pp. 325-331. The attestation of this distinction in the *Kitāb* of Sībawayh is significant since it may be the first consciously authored book in Arabic. Gregor Schoeler bases this claim largely on the existence of internal references within the text. For further details, see Gregor Schoeler, *The Genesis of Literature in Islam: From the Aural to the Read*, tr. Shawkat Toorawa (Edinburgh: Edinburgh University Press, 2009), pp. 87-90.

⁹¹ Vishanoff, *Formation*, esp. pp. 152-189; 254-278.

interpretations that would engender certainty. In the introduction to this work, he presents a standard Aristotelian theory of representation.⁹² According to this model, a referent has four forms: 1) an ontological existence in-itself, 2) knowledge that resembles the ontological existent, 3) the verbal expression of this knowledge, and 4) writing of the verbal expression.⁹³ The commensurability of these forms of the referent guarantee the validity of a representation. Although these four forms of the referent are equivalent in terms of the information they convey, they are not the same. The first form, that of the existence of a referent in-itself, is primary and the most important form since it provides an objective reference point against which to check the other forms of the referent. Thought and expression that match reality are objectively correct.

Due to importance of the referents in reality for grounding thought and language, one would expect that isolating and classifying these self-subsisting referents should be unproblematic. Ibn Qudāma, however, deconstructs the commensurability of these forms of the referent. According to him, knowledge either takes the form of a concept, which represents a single referent, or an assent of judgment (*tasdīq*), which represents the combination of several referents. In language, a definition corresponds to a concept whereas a syllogism corresponds to a judgment.⁹⁴ A definition may take three forms: 1) a literal definition that details the essential attributes of something, 2) a description that mixes essential attributes, entailments, and accidental attributes, and 3) synonyms.

⁹² In the following chapters I will examine these discussions of representation in the introductions of works of *uṣūl al-fiqh* in more detail.

⁹³ Ibn Qudāma, *Rawḍat al-nāẓir wa-jannat al-munāẓir fī uṣūl al-fiqh* (Cairo: Al-Maṭba‘a al-Salafiya, 1965), p.7;

⁹⁴ Ibn Qudāma, *Rawḍa*, 4.

According to Ibn Qudāma, the literal definition provides the objectively correct representation of the referent, but in practice it is too difficult to obtain. Instead, he argues that scholars should use descriptions that fulfill an intended goal.⁹⁵ In addition, he acknowledges that a syllogism cannot validate a definition in general since each term of a definition would either need to be defined, which would lead to an infinite regress, or that the definition could only end with forms of necessary knowledge, but it is seldom possible to reach this end.⁹⁶ Ultimately, Ibn Qudāma suggests that words refer only to more words rather than an ultimate referent in reality that would make objective knowledge possible.

The inability to provide an objective definition or validate it according to the standards of the Aristotelian model of representation has several important implications. First, language cannot “objectively” represent reality. Second, language can only fail to correctly represent a referent if language is fundamentally unable to access thought, or if thought cannot perfectly copy reality. In either case, language, thought, and reality cannot be equivalent in terms of information. Since language and thought cannot access reality as it really exist, language and thought cannot be objectively validated or invalidated.

However, Ibn Qudāma does not deem acceptable any statement about a particular matter. After all, he is a jurist who champions particular answers on legal and theological issues. Furthermore, his ability to critique representation still presumes some basis for meaningful communication between people. Language is not totally indeterminate and

⁹⁵ Ibn Qudāma, *Rawḍa*, 5-7.

⁹⁶ Ibn Qudāma, *Rawḍa*, 7-8.

unstable. Rather, he argues that communities should adopt definitions that will serve as criteria for truth. This position effectively upends the Aristotelian model of representation by making language primary and thought and reality secondary.⁹⁷ In effect, language creates and determines the contours of reality and thought such that meaning cannot be a stable and fixed reference point.

The fact that reality does not mediate representation does not necessarily lead to uncertainty if one were to follow Ibn Qudāma's view on definitions. If a community of speakers has a perfect mastery over language with stable and univocal meanings there would be no ambiguity. However, as already demonstrated above, Muslim jurists did not claim that Arabic was such a language at any discursive level. As we will see below, jurists also did not claim to be such perfect masters over their discursive practices. This point acknowledges the instability in the relationship between word and meaning. Furthermore, the fact that discursive communities should adopt different definitions fractures the supposed unity of language and different fields of learning.

Finally, Shīrāzī offers another critique of the stability of meaning; a critique tied to the way that the discursive practices of Arabs changed after the advent of Islam. Like other jurists, Shīrāzī divides the meaning of words into conventional usages, technical religious terms like *ṣalāt* (prayer), customary usages, and new usages created on the basis of *qiyās*, or analogy. According to Shīrāzī, the lexicographical tradition transmits

⁹⁷ Besides Foucault, a number of scholars have made this point. For a discussion of this at the level of the word, see Barthes, *Semiotics*, pp. 13-34. For a discussion at the level of the text, see Stanley Fish, *Is There a Text in This Class?: The Authority of Interpretive Communities* (Cambridge: Mass; Harvard University Press, 1980), esp. 1-17; 303-321. Below, we will see that based on his knowledge of Critical Legal Studies, Sherman Jackson uses this point to argue that *uṣūl al-fiqh* is neither a prescriptive nor a descriptive system for the derivation of law.

information on all of the meanings of a word so as to ensure the stable usage and the unity of the language. Thus, if there is evidence to indicate that a particular word in the Qur'ān or a *ḥadīth* should be interpreted according to a customary usage, one must interpret the word according to its customary usage during the Prophet's lifetime in Mecca and Medina. If one interpreted the word according to a later customary meaning this would distort the meaning of the text.⁹⁸ True, this position acknowledges that the meanings of words change due to historical and regional factors. Nevertheless, Shīrāzī and most jurists claim that the lexicographical tradition provides a record of discrete meanings of the word so as to allow one to find the objectively correct reading of a text.

However, his discussion of the analogical extension of the meanings of words undermines the stability of meaning and, more broadly, of representation within Arabic. According to him, the early Arabs use to name individual things (*a'yān*) such as using the word "*khamar*" to designate wine made of grapes. Later speakers of Arabic extended to the denotive scope of these words to include a larger group of things. Thus, the word *khamar* was extended to all forms of alcohol-based intoxicants.⁹⁹ His interlocutor then objects that this is not an example of analogical extension of the meaning since the conventional meaning of a word acts like a genus for its application to different species of referents. Nevertheless, Shīrāzī rejects this argument since,

It is unheard of that the early Arabs ever said, "This is conventionally used for a genus of referents," since they did not use the concepts genus and species in their speech. Rather, modern speakers adopted the terms genus and species for ease

⁹⁸ Shīrāzī, *Sharḥ al-luma'*, ed. 'Abd al-Majīd Turkī, 2 vols. (Beirut: Dār al-Gharb al-Islāmī, 1988), vol 1, pp. 180-181.

⁹⁹ Shīrāzī, *Sharḥ*, vol. 1, pp. 185-186.

and pedagogical reasons. As for the early Arabs, they used words to designate only individual things without ever mentioning whether this meaning is for a genus or individual. So they would say this is a horse and that is a wolf...It has not been related that they ever said, "We conventionalized this meaning for genus," but rather it is related that they use to call these specific referents with those names such that the use of these names is restricted and does not admit anything else when judged according to the standard of the conventional meaning.¹⁰⁰

The conventional reading of this passage would argue that Shīrāzī is merely indicating that due to the translation of Hellenistic learning into Arabic that Arabs can now use terms like genus and species to analyze the relationship among words and meanings. Although this reading is true, it does not recognize the potential implications of this passage. For Shīrāzī, the pre-Islamic Arabs lived in a world of immanent representation populated by the specific and tangible. With the passage of time, scholars like Shīrāzī began to live in a world of abstract relationships and transcendental representation based on the Aristotelian taxonomy that creates an organic unity. This is not to say that Shīrāzī denies the ability to analogically extend the meaning of a word to cover new referents.¹⁰¹ Indeed, he recognizes the reality and need for such analogical extensions.

Although Shīrāzī explicitly frames such changes in linguistic representation as merely a historical process, it is tempting to read this passage as recognizing the effect of literacy on representation. Walter Ong has argued for the importance of literacy for the development of abstract reasoning. According to Ong, illiterate individuals tend to think in situational terms that are close to real life experiences. On the other hand, literate

¹⁰⁰ Shīrāzī, *Sharḥ*, vol.1, p. 186.

¹⁰¹ Shīrāzī, *Sharḥ*, vol.1, p. 189.

individuals can think in abstract categories that enable modes of deductive and inductive reasoning.¹⁰² It would not be all that surprising if Shīrāzī was aware of how much reading and knowledge changed his view of the world in comparison to contemporary illiterates with whom he would have interacted. Indeed, the preceding quotation of Shīrāzī paints a picture Arabs living before Islam who spoke in concrete terms about their actual surroundings and experiences. Whatever the case may be, the passage does not reconcile the immanent and transcendental forms of representation. Rather, the quotation points to a profound rupture within the meaning of words that flows at least across time if not also socio-economic groups. This rupture reveals the instability of meaning at the level of the word due to changing patterns of education among scholars that affect how they think and speak about the world.

To sum up, in this section, I examined the conception of meaning at various discursive levels. Rather than meaning being a fixed and stable reference point that would ensure the commensurability of knowledge and language usage across different discourses, works, and time, jurists expressly signal how unstable it is. At the level of genre and texts, form affects content such that these two cannot be separated. At ever smaller discursive levels the instability of meaning becomes more complex. Ibn Qudāma and Shīrāzī deconstruct the notion that reality mediates thought and language. In different ways, Ibn Qudāma and Shīrāzī reveal how language usage and knowledge put meaning into a state of flux—albeit this is only partial flux due to way that previous discourse governs the production of new discourse. The instability of meaning creates uncertainty

¹⁰² For a survey of the difference between the reasoning of oral and literate cultures, see Walter Ong, *Orality and Literacy: Technologizing of the Word* (New York: Methuen, 1982), pp. 49-57.

that calls for the constant interpretation on the part of scholars as we will see in following sections.

d. Subjects of Discourse

Ibn Qudāma deconstructs the Aristotelian model of representation, one that hinges on self-subsisting referents that exist in reality and provide an objective point against which to judge representation. Instead, he argues that discursive convention should determine meaning. One could save representation from not being bound to reality by affirming a perfect subject who has complete mastery over the communal discursive practice(s). This perfect subject would thereby ensure the continuity and unity of the intellectual tradition. The less mastery that a jurist has over such institutionalized meanings, however, the more uncertainty his discourse would have.

At first glance, it is tempting to assume that jurists—as both readers and writers—have or at least claim to have this perfect command over the legal tradition. However, jurists claim that uncertainty plays a central role in their intellectual production. In the case of the digests, scholars write for students and in the case of commentaries for more advanced scholars. Clearly, a student is marked by his lack of knowledge and error, but more advanced scholars also claim to be contending with uncertainty. Bājī states that,

So whoever examines this book of mine should not think that the comments, explanations, analogies, and examinations that I wrote down in here are decisive in my view such that I reproach and slander whoever disagrees with my view, rather my view is only the full extent of my *ijtihād*.¹⁰³

¹⁰³ Bājī, *Muntaqā*, vol. 1, p. 202

As we saw in the previous section, he also says that great jurists often hold contradictory opinions regarding the same case. As both producers and interpreters of language, jurists did not claim to have a perfect mastery over it such that meaning could be stable and unequivocal when properly interpreted. It is thus inevitable that works of law and language would give rise to uncertainty. However, this uncertainty opens each school of law to interpretation and analysis.

Admittedly, it is impossible to expect each jurist to know perfectly every aspect of his school's discursive tradition. Nevertheless, scholars distance themselves from their schools in ways that create subtle discontinuities and uncertainty. For example, both Bāji and Ibn Ḥazm write digests of their own works. These digests do not appear to differ qualitatively or quantitatively that much from the commentaries of Ibn Qudāma and Sarakhsī. At first glance, the point that they are writing digests may seem trivial, but it raises two questions. First, in each case, why would each jurist state that he is summarizing an earlier work of his own rather than simply summarize the source text without further ado? To write a digest of one's own commentary in effect distances the source text unless the meaning is really stable and form does not matter. However, the previous section suggests that jurists did not think meaning was necessarily a completely stable reference point. Moreover, if form does not affect content, it would seem pointless to write a digest of one's commentary since the form should not change anything of substance. Second, how did each jurist go about producing his digest? Did he really rely directly on his commentary to produce the digest? If so this would suggest that each jurist attached some significance to the form of his prior work for mediating the form and content of the digest.

Neither jurist directly addresses these questions, but in the case of Ibn Ḥazm, these questions have an odd twist since he does not base his work upon that of an earlier figure in the Zāhirī school. He does not appear to cite the opinions of Zāhirī jurists in his chapter on sales. Like other Zāhirīs, he rejects *taqlīd*. The lack of engagement with earlier Zāhirī works and failure of the Zāhirīs to successfully become institutionalized invites the question: in what sense are Ibn Ḥazm’s legal positions continuous with those of the Zāhirīs of Baghdad? Did he study their works and simply not mention them, or was his claim to be Zāhirī a way to create his own school of law while only adopting several sufficiently vague Zāhirī positions on the sources of law, nature of language, and issues of legal epistemology? In effect, he claims to be heir to a tradition that he does not invoke, and in fact the Zāhirī school adopted ideological positions that thwarted institutionalization.

e. History

These differences of opinion and the uncertainty inherent in language justify the practice of interpretation and more generally the writing of trained jurists, as Bājī states that,

So whoever has appropriate training may examine and act in accordance with his *ijtihād* whether it agrees with my opinion or not. However, whoever has not reached this level let him make what this book contains his source of peace and aid.¹⁰⁴

For Bājī, this uncertainty not only goes hand in hand with a theory justifying the interpretive activities of jurists, but also complements a theory of the institutional

¹⁰⁴ Bājī, *Muntaqā*, vol. 1, p. 202

authority of jurists. To be precise, a theory that only trained jurists may exercise *ijtihād* requires a institution to both train and certify who may practice *ijtihād*.

On the other hand, Ibn Rushd argues that fundamentally law and society require interpretation since law as found in the Revealed sources is finite but the cases are infinite. Thus the ambiguity inherent to language does not become necessarily a failing, but the means by which jurists respond to the changing needs and development of the community. The jurist and his reasoning thus become the locus for a dialectic between the infinite and finite that develops the law.¹⁰⁵

If one gives due consideration to the statements examined above about meaning and the nature of jurists' mastery over it, uncertainty is an inevitable aspect and product of their intellectual production. From the level of genres to individual words, jurists recognize, albeit only in their more unguarded moments, that meaning does not have a stable and objective existence. To participate in discourse either as a producer or recipient of it is to shape and redefine meaning in ways that put it in a state of constant flux. Although one cannot create one's discourse from scratch, one cannot use discourse as a perfectly fixed and stable medium for conveying knowledge. Rather, this fluid state of discourse gives rise to countless works of law over the centuries.

In terms of Islamic law, contemporary Western scholars often judge the newness of a legal opinion on the basis of things like the use of *ijtihād* to solve a new case or create a position that differs from the previously accepted position. Neither of these criteria is actually that transparent or objective when applied to an analysis of works of

¹⁰⁵ Ibn Rushd, *Bidāya*, vol. 1, pp. 15-16.

fiqh. In the following chapters of this study, I will examine many cases where jurists from the different schools all appear to agree on some issue related to the concept of *gharar*. However, generally a closer examination of their opinions reveals differences that range from the subtle to the highly significant in terms of their legal reasoning. When analyzed carefully, these differences in the reasoning of jurists sometimes reveal insights into their constructions of positive law that go against the grain of the typical portrayal of schools based on works of *uṣūl al-fiqh*. For example, although the Zāhirīs are the most averse to uncertainty in the interpretation of law and the Ḥanafīs are supposedly the most accepting of uncertainty in the interpretation of law, when it comes to commercial transactions, the Sarakhsī, a Ḥanafī, is far stricter than Ibn Ḥazm, a Zāhirī, when it comes to uncertainty. Indeed, Sarakhsī is generally the strictest of all the jurists when it comes to *gharar*. This difference in the level of leniency with respect to the various kinds of uncertainty in a commercial transaction reflects the different forms of knowledge, reasoning, and descriptive techniques that jurists employ to represent a specific transaction.

Discourse analysis examines the epistemic systems that define the concepts, referents, modes of reasoning, and themes that jurists employ. One should not so quickly dismiss the ways that jurists reconfigure a discursive element as merely a technical refinement or a post-hoc rationalization.¹⁰⁶ Such discursive changes provide invaluable insight into the intellectual developments among an intellectual community. Law is

¹⁰⁶ Although Norman Calder has presented the most sensitive reading of changes and developments in post-formative law, he views juristic discourse as largely a form of intellectual patterning whose significance is self-referential. See Norman Calder, *Islamic Jurisprudence in the Classical Era* (Cambridge: Cambridge University Press, 2010), chs. 1-2.

ultimately more than a collection of cases and verdicts. Rather, the reasoning of jurists plays an important and constructive role in the delineation of the ethical and intellectual principles that form a community, or at least in delineating the way that a community wanted to envision itself.

IV. Theoretical Discourses of Islam

In addition to works of *fiqh*, I use theoretical works of *uṣūl al-fiqh*, *kalām*, and philosophy throughout this study. By the term “theoretical,” I mean that these aforementioned genres claim to ground other discourses by supplying the necessary premises, arguments, modes of reasoning, and forms of knowledge that make other fields of knowledge possible. For example, jurists define *uṣūl al-fiqh* as the knowledge required to derive and justify *fiqh*.¹⁰⁷

Scholars of Islamic law have analyzed this claim about the relation between *uṣūl al-fiqh* and *fiqh* from a number of perspectives.¹⁰⁸ On the one hand, Hallaq largely embraces the claims of Muslim jurists about the relationship between these two genres.

¹⁰⁹ On the other hand, Sherman Jackson refers to *uṣūl al-fiqh* as “theory talk” that does

¹⁰⁷ For examples, see Abū al-Wafā’ ‘Alī b. ‘Aqīl, *Al-Wāḍiḥ fī uṣūl al-fiqh*, ed. George Makdisi, 5 vols. (Beirut: Franz Steiner Verlag, 1996), vol. 1, pp. 1-2; ‘Alī b. Muḥammad al-Āmidī, Bāji, *Iḥkām al-fusūl fī aḥkām al-uṣūl*, ed. ‘Abd al-Majīd al-Turkī (Beirut: Dār al-Gharb al-Islāmī, 1984) vol. 1, p. 171; Ibn Qudāma, *Rawḍa*, p.4; Shīrāzī, *Sharḥ*, vol 1, pp. 161-163.

¹⁰⁸ For the most current overview of the secondary literature about *uṣūl al-fiqh*, see David R. Vishanoff, *Formation*, pp. xiii-xviii.

¹⁰⁹ For Hallaq’s views, see Hallaq, “*Fatwās*,” pp. 29-65; Hallaq, “Model,” 109-134; Hallaq, “Gate,” pp. 3-41; Hallaq, “Was al-Shāfi‘ī the Master Architect of Islamic Jurisprudence?,” *The International Journal of Middle East Studies* 25, no. 4 (November 1993): pp. 587-605. In more recent writings, Hallaq has argued for the essentially dialectic nature of the

not prescribe or describe the derivation of law.¹¹⁰ Notwithstanding their contradictory views, both scholars of Islamic law agree that *uṣūl al-fiqh* provides jurists with a discursive paradigm.

My ambition is not as lofty as Hallaq's or Jackson's to prove the global relationship between *uṣūl al-fiqh* and *fiqh*. Rather, I want to examine the relationship of these two genres in terms of the subject of this study—uncertainty. In his trailblazing study of *uṣūl al-fiqh*, Aron Zysow argues that concern for issues of epistemology lies at the heart of *uṣūl al-fiqh*. According to him, *uṣūl al-fiqh* evolved out of the early legal and theological debates about the sources of law, nature of language, modalities of interpretation, and relationship that exists between God and the Islamic community.¹¹¹ He details the different methods of reasoning, hermeneutic techniques, and sources of law that jurists employ in order to put law on a probabilistic if not a certain footing. He concludes the introduction to his study by stating that *uṣūl al-fiqh* offers scholars of Islam a more nuanced understanding of *fiqh*.¹¹² Unfortunately, neither Zysow nor anyone else has analyzed the role of epistemological issues in *fiqh*, or the relationship between the epistemological issues in *uṣūl al-fiqh* and *fiqh*.¹¹³

prescriptive and descriptive character of *uṣūl al-fiqh* which appears to be a concession to open-ended nature of *uṣūl al-fiqh*. Hallaq, *Transformations*, pp. 72-78.

¹¹⁰ Sherman A. Jackson, “Fiction and Formalism: Towards a Functional Analysis of *Uṣūl al-fiqh*,” in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002), pp. 178-179.

¹¹¹ Zysow, *Economy*, p.1.

¹¹² Zysow, *Economy*, p. 4.

¹¹³ In a thoughtful article, Aron Zysow shows that the relationship between *kalām* and *uṣūl al-fiqh* is more complex than the simple claim that *kalām* grounds or has infiltrated *uṣūl al-fiqh*. Rather he points to the “associations” between *kalām* and *uṣūl al-fiqh* in order to show how

In the following chapters, I compare the uncertainty associated with *gharar* to the varieties of uncertainty discussed in *uṣūl al-fiqh* and *kalām*. At first glance, the appearance of the term uncertainty (*jahl*) and the general concern of jurists to define certainty suggest a conceptual overlap between the theoretical discourses and *fiqh*. However, the forms of uncertainty associated with *gharar* and those discussed in *uṣūl al-fiqh* and *kalām* are structurally and functionally different as I will demonstrate in the following chapters. Nevertheless, in both cases, certainty defines and subsumes the two forms of uncertainty.

V. Conclusion

In this chapter, I briefly contextualized the post-formative jurists and major genres that my study employs. Although the institutionalized schools of law produced these jurists, these jurists did not view their work as a simple repetition of the school's opinions, notwithstanding their portrayal along these lines in biographical works. Rather, uncertainty was inherent in their intellectual production at levels of discourse that ranged from the word to the entire genres. It was the ability of jurists to locate differences within the school's doctrines and interpret them that invited jurists to write. In fact, these jurists derived their legitimacy from knowledge of the discursive methods of the school.

these two fields of scholarship interacted to define the status of various theological positions in Islamic history. Zysow, "Mu'tazilism and Māturīdism in Ḥanafī Legal Theory," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Boston: Brill, 2002), p. 235. In an earlier work, George Makdisi claims that Shāfi'ī's *Risāla* was a polemic against theology and philosophy but later *uṣūl al-fiqh* became a backdoor for these fields to gain entrance into the schools of law. See, George Makdisi, "The Juridical Theology of Shāfi'ī: Origins and Significance of *Uṣūl al-Fiqh*," in *Studia Islamica* 59 (1984): pp. 14, 16-18, 42-46. More recently, Lowry has evaluated the polemical context of the *Risāla* in order to question some of Makdisi's assertions. For further details, see, Lowry, *Theory*, 298-318.

However, the fact that these discursive methods ground the work of jurists does not mean that their works necessarily form an organic unity between all areas of the legal discourse. Although *gharar* and *uṣūl al-fiqh* are both concerned with epistemology in the broadest sense, a close examination reveals how these two discourses construct uncertainty in different ways, as we will see in the following chapter.

Chapter Two

The Conceptualization of Uncertainty

This chapter examines the different types of uncertainty that form the conceptual architecture of *gharar*. By the term “conceptual”, I mean that jurists treat the causes of *gharar* as clearly defined and delineated forms of thought that they can employ to analyze and describe the legality of commercial transactions. Although jurists generally agree on the small number of forms of uncertainty that cause *gharar*, this chapter will study the different ways that each jurists conceptualizes these forms of uncertainty. As for the use of the term “architecture,” I mean that these forms of uncertainty have a hierarchical relationship that begins to reveal a rationality to the uncertainty associated with *gharar*. The phrase “the conceptual architecture of *gharar*,” however, presents the first and perhaps most intriguing paradox of this study. Generally speaking, concepts and hierarchies are supposed to be the *sine qua non* of knowledge, so what does it mean to conceptualize uncertainty?

To begin to unravel and appreciate this paradox, we need a model of thought and more broadly of representation that will orientate the exploration of this question. Fortunately, in introductions of works of *uṣūl al-fiqh* and *kalām*, Muslim scholars generally present rich and nuanced theories of representation by defining the terms ‘*ilm*, ‘*ẓann*, and ‘*jahl*, which may be translated respectively as certainty, probabilistic knowledge, and uncertainty. These discussions offer a terminological and conceptual starting point for analyzing representation and uncertainty within discussions of *gharar*.

In their analyses of the definitions of these epistemological terms, Muslim scholars attribute great importance to the subtle variations of their definitions of certainty.

However, the definitions of certainty generally have the structure: certainty ('ilm) is thought of a referent as it really is (*ma'rifat al-ma'lūm 'alā mā huwa 'alyahi*).¹¹⁴

Certainty thus results from an identity that perfectly equates thought and its referent, the *ma'lūm*, in accordance with the latter, which governs knowledge and representation.

Thoughts and statements are only correct when they copy the referent. Furthermore, as we saw in the previous chapter with Ibn Qudāma, although thought of the referent is commensurable with this referent, it is not ontologically the referent itself.

Similarly, definitions of uncertainty have the general form: uncertainty is thought of the referent contrary to the way it really is.¹¹⁵ With uncertainty the problem is not the abandonment of identitarian thought and representation characterized by discrete thoughts that take the form of concepts or predicates.¹¹⁶ Rather, like certainty,

¹¹⁴ For examples of definitions that correlate thought and its referent, see Abū Bakr Muḥammad b. al-Ṭayyib al-Bāqillānī, *Kitāb al-Tamhīd*, ed. Richard J. McCarthy (Beirut: Librairie Orientale, 1957), p. 6, ¶. 5; Abū Ḥusayn Muḥammad b. al-Bāṣrī, *Kitāb al-Mu'tamad fī uṣūl al-fīqh*, ed. Muḥammad Ḥamīd Allāh, 2 vols. (Damascus: Institut Français de Damas, 1964), vol. 1 p. 10; Āmidī, *Abkār*, vol. 1, pp. 16-21; Bājī, *Iḥkām*, vol. 1, pp. 170-171; Ibn 'Aqīl, *Wāḍiḥ*, vol. 1, pp. 3-4; Ibn Ḥazm, *Al-Iḥkām fī uṣūl al-aḥkām*, 8 vols. in 1 (Cairo: Maktabat al-Khānjī, 1925), vol.1, pp. 36-39; Shīrāzī, *Al-Luma' fī uṣūl al-fīqh*, ed. Yūsuf 'Alī Baydawī (Damascus, Dār Ibn Kathīr, 2002), p. 29; Shīrāzī, *Sharḥ*, vol 1, pp. 146-148.

There are notable exceptions to this general structure. For examples that define certain knowledge as that which makes one a knower ('ālim), a definition which is usually attributed to Ash'arī, see, Āmidī, *Abkār*, vol. 1, p. 17; Ibn 'Aqīl, *Wāḍiḥ*, p. 4; Ibn Qudāma, *Rawḍat*, p. 13. Another notable example is the definition attributed to Ibn Fūrak that certain knowledge is what necessitates the perfect judgment and action of one, see Āmidī, *Abkār*, vol. 1, p. 17.

Franz Rosenthal has collected and categorized many of these different definitions. See, Franz Rosenthal, *Knowledge*, pp. 52-69.

¹¹⁵ Bājī, *Iḥkām*, p. 171; Abū Hāmid Muḥammad b. Muḥammad al-Ghazālī, *Al-Mustaṣfā min 'ilm al-uṣūl*, ed. Sulaymān al-Ashqar, 2 vols. (Beirut: Mu'assasat al-Risāla, 1997), vol. 1. p. 67; Shīrāzī, *Sharḥ*, vol. 1, p. 151.

¹¹⁶ Throughout this study I employ the term concept in a rather loose fashion since some scholars advocated a nominalist theory of representation such as with the Basran Mu'tazilites. For further details, see Richard MacDonough Frank, *Beings and Their Attributes: The Teaching*

uncertainty is the relation of thought and a referent, but this relation is incorrect. More disturbing for those seeking the correct identity, there are seemingly an infinite number of wrong combinations of thoughts and referents. The incorrect representation does not point the way to the correct identity in any essential manner so as to help one to make an informed and conscious decision. The relationship between uncertainty and certainty is thus akin to searching for a pin in haystack of errors.

However, this infinite uncertainty is still bound to the system of identitarian thought characterized by discrete referents and thoughts.¹¹⁷ In addition, according to Muslim scholars, certainty and uncertainty are contraries, which in the Aristotelian conception of difference means that uncertainty and certainty cannot coexist in the same subject at the same time. Nevertheless, each contrary may be predicated of the same subject without essentially changing the subject.¹¹⁸ Notwithstanding the supposed

of the Basran School of the Mu'tazila in the Classical Period (Albany: State University of New York Press, 1978), p. 27.

¹¹⁷ In two thought provoking articles, Michael G. Carter examines the epistemological problems that the infinite syntheses associated with uncertainty give rise to in Islamic learning. According to Carter, the infinitude of uncertainty is equivalent to lies from the perspective of Muslim scholars. To address the problems that an infinite number of potential syntheses pose, Carter argues that Muslims developed a fixed corpus of knowledge that they ceaselessly repeated. See, Michael Carter, "Infinity and Lies in Medieval Islam," in *Philosophy and Arts in the Islamic World: Proceedings of the Eighteenth Congress of the Union Européenne des Arabistes et Islamisants held at the Katholieke Universiteit Leuven* (Leuven: Peeters Press & Department of Oriental Studies, 1998), pp. 233-242. Carter, "More Infinity, More Lies: History, Truth and Change in Medieval Islam," in *Continuity and Change in the Realms of Islam: Studies in Honour of Professor Urbain Vermeulen*. Eds. K. d'Hulster and J. van Steenberg (Leuven: Peeters Publishers & Department of Oriental Studies, 2008), pp. 105-115.

¹¹⁸ For statements that these two terms are contraries, see Abū Ḥasan 'Alī b. Ismā'īl al-Ash'arī, *Kitāb al-Luma' fī radd 'alā ahl al-ziyagh wa'l-bida'*, in *The Theology of Al-Ash'arī*, tr. Richard J. McCarthy (Beirut: Imprimerie Catholique, 1953), p. 11, ¶. 16; Ibn Ḥazm, *Taqrīb*, p. 70; Abū al-Walīd Muḥammad b. Aḥmad b. Rushd, *Kitāb al-Maqūlāt*, in *Talkhīṣ Manṭiq Aristū*, ed. Jīrār Jahāmī, 3 vols. (Beirut: Manshūrāt al-Jāmi'īya al-Lubāniya, 1982), vol. 1, pp. 37-38. Interestingly, Āmidī expands the contraries of 'ilm to include, doubt, probabilistic knowledge,

equality of uncertainty and certainty, both terms presume an identity between a finite referent and finite thought. To be precise, uncertainty presumes the correct combination of thought and its referent in order to invalidate all of the incorrect combinations.

However, certainty does not require the infinite number of incorrect combinations between thoughts and referents that engender uncertainty in order to validate certainty. If these incorrect combinations were an essential aspect of certainty, then one would have to pass through each of them in order to obtain and validate the correct combination of thought and referent with respect to knowledge of something. The validation of certainty would thus become a Sisyphean task. To best of my knowledge, no Muslim employs this reasoning to suggest that certainty and uncertainty have an unequal relationship. Nevertheless, in works of *uṣūl al-fiqh* and *kalām*, most scholars assert that humans have some innate certainty that grounds the acquisition of more knowledge and thus delimits uncertainty.¹¹⁹ On the hand, we will see in the conclusion of this chapter, that scholars claim that a human mind characterized by pure uncertainty without the least trace of certainty is impossible. Uncertainty is thus a by-product of the forms of certainty that one possesses.

Although works of *fiqh* do not provide explicit discussions of representation and uncertainty, commercial law offers a starting point for examining these issues. In particular, jurists prohibit commercial transactions due to *gharar*, which has a number of causes. For my purposes, the most interesting causes are varieties of uncertainty, which,

heedlessness, death, sleep, and speculation (*naẓar*). Āmidī, *Abkār*, vol. 1, p. 52. For a brief discussion of Aristotelian notions of difference, see, Gilles Deleuze, *Différence et Répétition* (Paris: Presses Universitaires de France, 1968), pp. 45-52.

¹¹⁹ Ibn Qudāma, *Rawḍat*, pp. 13-14; Shīrāzī, *Luma'*, p. 30.

unlike the uncertainty mentioned in works of *kalām* and *uṣūl al-fiqh*, engender valid representations and legal judgments. In other words, the uncertainty associated with *gharar* functions like a form of certainty that allows one to make informed statements and decisions. To understand how this uncertainty enables valid judgments we need to examine 1) the conceptual architecture of uncertainty in discussions of *gharar* and 2) how *gharar* relates this conceptual architecture to the analysis of specific commercial transactions. This chapter will address the first issue and the remaining chapters the second issue.

The uncertainty associated with *uṣūl al-fiqh* and *kalām* threatens representation by implying the possibility of an infinite number of incorrect combinations of thoughts and referents. However, *gharar* does not involve such an infinite and all-consuming notion of uncertainty. Rather, jurists identify a constellation of causes for *gharar* which derive from uncertainty with respect to: 1) the qualitative grade and quantity of the good, 2) the delivery date of the good, and 3) the ability to deliver the good. These forms of uncertainty function as concepts or defined moments of thought that enable valid representations and judgments with respect to particular transactions. In order to represent these forms of uncertainty, jurists employ several systems of knowledge to define each of these forms of uncertainty. In other words, knowledge enables the existence of these forms of uncertainty.

Below, I analyze all of the jurists' uses of the term *gharar* in order to isolate the forms of uncertainty associated with it. This method does not imply that *gharar* and these associated forms of uncertainty are completely self-contained conceptual entities. Jurists frequently state that transactions have uncertainty without invoking the term *gharar* to

describe the transactions. The categories of uncertainty and certainty are generally more productive in the writings of jurists than the technical term *gharar*. However, *gharar* has manageable and rather well defined material and conceptual boundaries within legal works. Just as importantly, *gharar* opens the analysis of other concepts and modes of reasoning within Islamic commercial law and the wider tradition of the Islamic sciences.

Finally, although I analyze the conceptual architecture of uncertainty in the discourse about *gharar*, I do not claim to have direct access to the thoughts and cognitive processes of either jurists or hypothetical counterparties to a transaction characterized by *gharar*. According to discourse analysis and the statements of Ibn Qudāma about the forms of existence of referent and their relations, I have access only to discourse about these thoughts and cognitive processes. Foucault and Ibn Qudāma assume a certain commensurability between thought and discourse, but this does not mean that they are the same thing. Jurists and scholars knowingly or unknowingly labor upon this dissonance in order to address the issue of *gharar* as we will see throughout this study.

I. *Gharar* As Fraud

Gharar as a technical legal term refers to particular forms of uncertainty that symmetrically affect the counterparties to commercial transactions in which both parties exchange countervalues. Thus, *gharar* would not directly apply to contracts like gifts. Some jurists, however, also employ the word *gharar* in the sense of fraud. Ibn Rushd begins his discussion of *gharar* by stating that, “The following sales are prohibited due to

fraud (*ghabn*) whose cause is *gharar*.”¹²⁰ In fact, form I of the root *gh-r-r* refers to fraud.¹²¹ Conversely, the word *gharīr*, from the form *fa‘īl*, which commonly has the same meaning as the form I passive participle, means to be someone’s trusted confident (*kafīl*).¹²² A full survey of the lexicographical tradition of this root is not germane here since these definitions do not directly figure in the discourses of my jurists.

Notwithstanding his equating fraud with *gharar*, Ibn Rushd devotes another section of the chapter on sales to a discussion of fraud (*tadlīs*) or potential losses (*ḍarar*).¹²³ In this section on fraud, Ibn Rushd discusses the following sales: 1) a third

¹²⁰ Ibn Rushd, *Bidāya*, vol. 3, p. 1198.

¹²¹ Abū Naṣr Ismā‘īl b. Ḥammād al-Jawharī, *Tāj al-lughā wa-ṣiḥāḥ al-‘arabīya*, ed. Imīl Badī‘ Ya‘qūb and Muḥammad Nabīl Ṭarīfī (Beirut: Dār al-Kutub al-‘Ilmīya, 1999), s.v. *gh-r-r*; E. Fagnan, *Additions aux Dictionnaires Arabes* (Beirut: Librairie du Liban, 1960), s.v. *gh-r-r*; Edward W. Lane, *Arabic-English Lexicon* (London: Williams and Norgate, 1865), s.v. *gh-r-r*; J.G. Hava, *Al-Farā‘id al-Durrīya* (Beirut: Catholic Press, 1951), s.v. *gh-r-r*; Muḥammad b. Durayd, *Kitāb Jamharat al-lughā*, ed. Ramzī Munīr Ba‘lbakkī (Beirut: Dār al-‘Ilm li’l-Malāyīn, 1987), s.v. *r-gh-gh*; Muḥammad b. Mukarram b. Manzūr, *Lisān al-‘Arab* (Beirut: Dār al-Bayrūt, 1957), s.v. *gh-r-r*; Muḥammad Murtaḍā al-Zabīdī, *Tāj al-‘Arūs*, ed. ‘Abd al-Sattār Aḥmad Farrāj (Kuwait: Maṭba‘at Ḥukūmat al-Kuwayt, 1974), s.v. *gh-r-r*; Muḥammad b. Ya‘qūb al-Firūzābādī, *Qāmūs al-muḥīṭ*, (Beirut: Dār al-Jīl, 1970), s.v. *gh-r-r*; R. Dozy, *Supplément aux Dictionnaires Arabes*, 3rd ed. (Leiden: E.J. Brill, 1967), s.v. *gh-r-r*. Wehr contains a similar definition. See, Hans Wehr, *Dictionary of Modern Written Arabic*, ed. J.M. Cowan (Ithaca: Spoken Language Services, Inc., 1994), s.v. *gh-r-r*. The pre-Islamic poet Imru’ al-Qays employs form IV, *agharra*, in his famous *mu‘allaqa* to describe how his character may have deceived a woman into hating him. Imru’ al-Qays, *Diwān Imri’ al-Qays*, ed. Muḥammad Abū al-Faḍl Ibrāhīm, 3rd ed. (Cairo: Dār al-Ma‘ārif, 1969), p. 13, l. 20. In one of the earliest literary uses of this root in prose that I have located, Jāhīz uses this verb in this sense. Abū Uthmān b. Baḥr Jāhīz, *Kitāb al-Bukhalā’*, 2 ed. (Damascus: Dār al-Yaqza al-‘Arabīya, 1963), p. 45.

¹²² Ibn ‘Abbād, *Muḥīṭ*; *gh-r-r*; Ibn Durayd, *Jamharat*, s.v. *r-gh-gh*; al-Firūzābādī, *Qāmūs*, s.v. *gh-r-r*; Lane, *Arabic-English*, s.v. *gh-r-r*; Ibn Manzūr, *Lisān*, s.v. *gh-r-r*; Al-Zabīdī, *Tāj*, s.v. *gh-r-r*. For a discussion of this noun form, see W. Wright, *A Grammar of the Arabic Language*, eds. W. Robertson Smith and M. J. de Goeje, 3rd ed., 2 vols. in 1 (New York: Cambridge University Press, 1967), vol. 1, pp. 136, 146.

¹²³ Coulson argues that the word *tadlīs* comes from the Byzantine Greek “*dolos*” since both words share the same meaning and root *d-l-s*. According to him, this term is one example of how Muslim jurists adopted a large portion of technical terminology and institutions like the *waqf* from Roman and Sasanian law. Coulson, *History*, p. 28.

party making a counteroffer after the counterparties have agreed upon the terms to a sale (*bay' al-rajul 'alā akhīhi*), 2) meeting a caravan to conduct a transaction on the highway instead of the city market (*talaqqī al-rukkāb*), 3) a city-dweller conducting business with or on behalf of a bedouin (*bay' al-ḥādir li'l-bādī*),¹²⁴ 4) and submitting false bids in an auction (*bay al-najash*) in order to drive up the price.¹²⁵ Interestingly, in the section about fraud, he does not use the term *gharar* to describe transactions. Ibn Qudāma and Shīrāzī also use *taghrīr* and *tadlīs* to discuss these last three transactions.¹²⁶

Although *gharar* and fraud arise from uncertainty, there is an important structural difference in the distribution of uncertainty in both cases. Ibn Qudāma states that when a seller defrauds a buyer, “he hides a defect which he knows so that the buyer imagines it does not exist.”¹²⁷ With fraud, one counterparty exploits its certainty against an unsuspecting counterparty. This is the same kind of certainty and uncertainty found in works *uṣūl al-fiqh* and *kalām*.

¹²⁴ Although most jurists prohibit these transactions in order to protect people from fraud, whom this law attempts to protect from fraud and why are issues of debate among jurists. For example, to Ibn Rushd, the goods of bedouins are nearly free from their perspectives so that they will take a lower price. However, if city-dwellers help them get the best price this will harm the urban population at large. See, Ibn Rushd, *Bidāya* vol. 3, pp. 1229-1230. Ibn Ḥazm rejects these arguments and instead claims that the Prophet prohibited these sales to protect bedouin from possible fraud. See, Ibn Ḥazm, *Muḥallā*, vol. 8, p. 453, ¶ 1469. Khiraqī, a prominent Ḥanbalī jurist, states that this sale is void if the bedouin makes a city-dweller his agent, does not know the prevailing market price of the good, and intended to sell the good in town. However, if one of these stipulations is not met the sale is licit. Ibn Qudāma, however, argues that a city-dweller may buy for a bedouin since it protects the bedouin from being exploited. See, Ibn Qudāma, *Mughnī*, vol. 4, p. 163, ¶¶. 3072-3073.

¹²⁵ Ibn Rushd, *Bidāya* vol. 3, pp. 1227-1232.

¹²⁶ Ibn Qudāma, *Mughnī*, vol. 4, p. 160, ¶. 3067; Shīrāzī, *Muhaddhab*, vol. 3, p.144.

¹²⁷ Ibn Qudāma, *Mughnī*, vol. 4, ¶. 2984, p. 114. Arabic reads, *katamahu 'an al-mushtarī ma'a 'ilmihī bihī aw ghaṭṭāhu 'anhu bi-mā yūhim al-mushtarī 'adamahu*. Bājī makes a similar statement. See Bājī, *Muntaqā*, vol. 6, p. 532.

On the other hand, in the more usual discussions of *gharar* that I will examine below, uncertainty with respect to some element of the transaction affects both counterparties who are conscious of their uncertainty. Due the symmetrical distribution of uncertainty among the counterparties, jurists often compare contracts characterized by *gharar* to forms of gambling as we will see in the following chapter in more detail. Like *ribā*, *gharar* also poses an ethical problem for jurists. In the case of *ribā*, jurists do not think that it is ethical for one to receive a profit without assuming any commercial and legal liability. In the case of *gharar*, jurists do not think that it is ethical for one to either profit or lose money because of uncertainty with respect to certain elements of the transaction. In the following section, we will begin to examine what commercial uncertainty is from the perspective of jurists.

II. Known-Unknowns, Unknown-Unknowns, and Discourse

As the definitions of certainty and uncertainty presented in the introduction to this chapter indicate, thought must work on the finite. If we take the insights of Ibn Qudāma into the role of discursive communities in defining the concepts and referents that lie behind words, then these concepts and referents can be of differing levels of complexity and differentiation. Nevertheless, one cannot think everything at once. When it comes to commercial transactions, one cannot worry about the infinite number of problems that might occur and to enumerate them would paralyze commerce.

Ibn Rushd al-Jadd (450-520/1058-1126) indicates the importance of defining a small number of uncertainties to analyze in commercial transactions. In his discussion of the *salam* contract, or the pre-paid forward contract in which one party pays immediately

to receive possession of a good at a later time, Ibn Rushd al-Jadd reports that some jurists permit this contract only if the good exists from the moment that the counterparties enter into the contract until the delivery date of the good. These jurists hold this position since the contract becomes due upon the death of either counterparty. Thus, the good must continuously exist for the contract to avoid *gharar*. However, Ibn Rushd al-Jadd responds in a tone of apparent exasperation,

This argument is not compelling (*lā yalzam*) because if contracts are legally valid and safe from *gharar*, what may unintentionally happen later is not taken into consideration (*fa-lā yurā‘ā mā yaṭra’* ‘*alayhā mim mā lam yuqṣad ilayhi*) since if this were so no contract, *salam*, or sale would ever be legally valid!¹²⁸

Likewise, Ibn Ḥazm argues that if every form of uncertainty caused *gharar*, the sale of a sheep would be impossible since one cannot know if it would die in the next moment.¹²⁹

By enumerating the forms of uncertainty to analyze, jurists create a system of known-unknowns. At the same time, they also create—either explicitly or implicitly—the forms of uncertainty that have no standing in the legal system. These undefined forms of uncertainty become the unknown-unknowns that have no effect on the validity of contracts and thus no standing within the legal system. In both cases, knowledge defines both the known-unknowns that it will represent and unknown-unknowns that it will not directly represent.

This division of uncertainty thus does not accord with some natural or purely pragmatic law. Returning to uncertainty about the potential death of a counterparty, it is

¹²⁸ Abū al-Walīd Muḥammad b. Aḥmad b. Rushd, *Al-Muqaddimāt al-mumahhidāt*, ed. Sa‘īd Aḥmad A‘rāb. 3. Vols. (Beirut: Dār al-Gharb al-Islāmī, 1988), vol. 2, p. 23. For further biographical details, see Makhḷūf, *Shajara*, vol. 1, p. 129, no. 376.

¹²⁹ Ibn Ḥazm, *Muḥallā*, vol. 8, p. 389, ¶ 1421.

true that one cannot predict death. However, jurists could prohibit a sale on credit to someone who is on his deathbed. Such a restricted position is easy to analyze and it seems likely that traders thought about such situations. Even in cases of *gharar*, one can imagine different ways to define particular a form of uncertainty as we will see below in the case of uncertainty associated with the delivery of a good.

In the case of *gharar*, jurists define the forms of uncertainty, or the known-unknowns, that cause *gharar* in two ways: 1) they develop typologies that detail the causes of *gharar* and 2) they analyze specific transactions characterized as having *gharar*. I will start with the typologies since they offer a convenient bird's-eye view of the causes of *gharar*.

a. Typologies of Uncertainty

When trying to examine the forms of uncertainty that engender of *gharar*, it seems sensible to look for explicit typologies of uncertainty in discussions of jurists about *gharar*. However, only the Mālikīs explicitly typologize the causes of *gharar* whereas Shīrāzī implicitly creates a typology of them through the subheadings of his chapter on *gharar*. Although these typologies provide an interesting starting point in understanding *gharar*, they are somewhat heterogeneous in terms of the causes enumerated and level of abstraction. For example, Bājī presents the most rudimentary and unusual typology of the causes of *gharar*. According to him, “*Gharar* is correlated with a transaction in three ways: through the contract, the counter-values of the transaction, and the delivery

date.”¹³⁰ Although this brief statement connects *gharar* with various elements of the contract, it does not enumerate its causes.

In his subheadings of the chapter on *gharar*, Shīrāzī elaborates the following causes of *gharar*:

1. Sale of something that seller does not own
2. Sale of a good whose ownership is not yet legally valid, i.e. sale of dowry someone will receive
3. Sale of a good whose delivery cannot be guaranteed
4. Sale of a tangible good which is undefined (*majhūl*)
5. Sale of something that cannot be examined at the time of the sale
6. Sale with a blind counterparty
7. Sale of something which can only be partially inspected
8. Sale of something with a protective skin
9. Sale of something whose quantity is undefined (*majhūl*)
10. Sale of a fetus
11. Sale of milk in the udder
12. Sale of fleece on the back of a sheep
13. Sale whose countervalue has yet to be defined at time of the contract (*ma'lūm*)
14. Sale of good whose price has yet to be defined at the time of the contract (*ma'lūm*)
15. Sale whose payment date is undefined at the time of the contract (*majhūl*)
16. Sale that is contingent on some event, i.e. rainfall
17. Sale with someone whose money is from a suspect source
18. Sale of a pregnant slave whose fetus is excepted from the sale¹³¹

As can be seen, some of the items in Shīrāzī’s list are forms of uncertainty that cause *gharar* in specific transactions. The sub-chapters 1-5, 7-9 and 13-16 are causes of *gharar*; however, jurists often combine some of these causes together, such as by treating

¹³⁰ Bājī, *Muntaqā*, vol. 6, p. 399. *Fa'l-gharar yat'allaqa bi'l-mabī' min thalāthat awjuh min jihat al-'aqd wa'l-'iwad wa'l-ajal.*

¹³¹ Shīrāzī, *Muhadhdhab*, vol. 3, pp. 30-47.

the description of the good and payment as one category. On the other hand, sub-chapters 6,10-12, and 17-18 refer to particular transactions.¹³²

Of the jurists who offer a typology of the cause of *gharar*, Ibn Rushd presents the theoretically densest discussion. He begins his chapter about *gharar* by stating that,

Gharar occurs in several different ways in sales due to uncertainty (*jahl*). Either the uncertainty involves:

1. Specification of the object of the contract or of the type contract
2. Description of the price and good of the sale, the quantity, or delivery date if there is one
3. The good's existence or the impossibility of getting it and this is related to the inability to deliver it
4. The well-being of the good by which I mean its time until expiration¹³³

This passage arranges the causes of *gharar* into four distinct groups of uncertainty.

However, the uncertainty associated with the contract and that associated with the remaining life of a good play a limited role in Ibn Rushd's discussions of *gharar*.

Furthermore, it is unclear why he combines uncertainty with respect to the quantity and quality of the good with that of the delivery date unless he conceives of the delivery date as a form of description and mensuration.

¹³² The Mālikī Muḥammad b. Aḥmad b. Juzayy (693-741/1294-1340) explicitly provides a similar typology. See, Muḥammad b. Aḥmad b. Juzayy, *Al-Qawānīn al-fiqhīya* (Beirut: Dār al-Qalam, 1977), pp. 169-170.

¹³³ Ibn Rushd, *Bidāya*, vol. 3, p. 1198. I have formatted the translation of this paragraph with the numbered sections in order to emphasize the key legal and commercial divisions that Ibn Rushd sets out in this paragraph. The Arabic reads, 1) *Al-jahl bi-ta'yīn al-ma'qūd 'alayhi aw ta'yīn al-'aqd*, 2) *al-jahl bi-waṣf al-thaman wa'l-mathmūn al-mabī' aw bi-qadrihi aw bi-ajalihi in kāna hunālika ajal*, 3) *al-jahl bi-wujūdihi aw ta'adhdhur al-qudra 'alayhi wa-hādihā rāji' ilā ta'dhdhur al-taslīm*, 4) *al-jahl bi-salāmatihi, a'nī baqā'ahu*.

Ibn Rushd concludes with the statement, “Sales combine more or less of these types of uncertainty,” which offers two important insights into *gharar*.¹³⁴ First, these forms of uncertainty are not simple contraries of certainty because they can exist in greater or lesser degrees. I will explore this point in more detail in the fourth chapter. Second, these forms of uncertainty can combine with one another.

Although the above typologies have some overlap in terms of the forms of uncertainty that engender *gharar*, these typologies are certainly quite different in terms of causes they enumerate. Furthermore, these typologies do not offer much insight into how these forms of uncertainty interact. Even when the typologies agree on a particular cause of *gharar*, this does not guarantee that the jurists share the same exact understanding of the cause. In order to address these issues, we will need examine the analyses of specific commercial transactions. The analyses indicate that jurists share a rather homogenous collection of forms of uncertainty that cause *gharar* and their modalities of interaction. Nevertheless, the jurists do not share a completely uniform understanding of each form of uncertainty. In the following section, I will examine forms of uncertainty that jurists treat as the primary causes of *gharar*.

b. Sale of the *Ma‘dūm* and Representation

In order to determine the causes of *gharar*, we need a model of representation that will guide our reading of the legal analyses of specific transactions. The model of representation that I discussed in the introduction to this chapter offers a starting point for

¹³⁴ Ibn Rushd, *Bidāya*, vol. 3, p. 1198.

an analysis of how these forms of uncertainty represent *gharar*. This model of representation, which is implicit in the jurists' discussions of *gharar*, subordinates representation to a referent. Or to put differently, representation works by describing the existence of some referent. Indeed, Ibn Ḥazm sums up this relation when he states that what does not exist cannot be represented through thought or language.¹³⁵ In fact, jurists prohibit the sale of the non-existent (*ma'dūm*) since they state that uncertainty with respect to the existence of the good causes *gharar*. This sale of the non-existent thus offers an important starting point for understanding *gharar*.

In a number of recent studies about the Western philosophical traditions, scholars have examined non-existent entities like logical contradictions and empirically impossible objects in order to reveal how representation works on these entities.¹³⁶ These non-existent entities bring to light in a highly stylized manner the essential premises about representation and existence within a given system of philosophy. For example, these studies reveal whether the primary existence of the referent is ontological, mental, or discursive within a given system of philosophy.

By the sale of the non-existent, jurists do not mean anything as exotic as the round-square or a unicorn. Rather, it refers to the sale of empirically possible goods, such as the sale of the dates from a specific palm tree several years in the future or the sale of milk in the udder of an animal. With these goods, jurists develop criteria by which to determine when these goods will exist and what can be said about them before they exist.

¹³⁵ Ibn Ḥazm, *Taqrīb*, p. 10.

¹³⁶ See, Alain de Libera, *La Référence Vide: Théories de la Proposition* (Paris: Presses Universitaires de France, 2002); Jocelyn Benoist, *Représentations sans Objet: Aux Origines de la Phénoménologie et de la Philosophie Analytique* (Paris: P.U.F, 2001).

In other words, jurists develop a system to define a notion of commercial and legal existence of goods. As we will see in more detail in the following chapters, when a referent does not exist it engenders uncertainty. The sale of the non-existent reveals the following hierarchy of the forms of uncertainty associated with *gharar*: uncertainty with respect to the quantity and quality of the good, uncertainty with respect to the delivery of the good, and uncertainty with respect to the delivery date. In turn, other causes of *gharar* derive from these primary forms.

More interestingly, these forms of uncertainty indicate how this discourse configures the existence of referents. For a good to exist means that one can make certain statements about its quality and quantity, the ability to deliver it, and the date of delivery. I will return to this point in the following chapters. For now, I will briefly examine the sale of the non-existent since it serves as a useful introduction to the analysis of these three primary forms of uncertainty.

i. Uncertainty with respect to the Quantity and Quality

In a discussion about the prohibition against the sale of unripe fruit from a specific garden, Ibn Ḥazm provides the most lucid discussion of uncertainty with respect to the quantity and quality of the good as a cause of *gharar*. At first glance, this prohibition is surprising, since one may sell fruit that does not yet exist by means of a *salam* contract. Although I will examine this transaction in more detail in chapter four, the fundamental problem for jurists is that the seller may not substitute fruit of the same species for fruit from this specific garden. For example, if a blight befell the fruit of specific garden the seller could not fulfill the contract by delivering fruit that he bought

from another garden since he would not know the quantity and quality of fruit that his garden would have produced. According to Ibn Ḥazm, the sale of this specific fruit is the sale of what has not been created (*mā lam yukhlaq*) and is therefore illicit since “perhaps it will not be created and if it is created only God knows (*lā yadrī aḥad ghayr Allāh*) its quantity and quality, so that this transaction is forbidden from every perspective.”¹³⁷ This brief statement indicates that the sale of what does not exist entails two forms of uncertainty. First, there is uncertainty with respect to whether the good will ever exist. Second, there is uncertainty with respect to the quality and quantity of the good.

Ibn Qudāma, Shīrāzī, and Bājī agree that the sale of the non-existent good engenders uncertainty with respect to the quantity and quality of the good.¹³⁸ On the other hand, while discussing *ribā*, Sarakhsī states that every existent has a quantity and quality that allows its comparison with other existents.¹³⁹

Finally, Ibn Rushd also connects the non-existent to uncertainty with respect to quantity and quality of the good. By *qiyās*, he permits the sale of unripe fruit (*mā lam yaṭib min al-thamar*) if fruit of the same type has already ripened in the same orchard or a nearby one. He goes on to state that, “Mālik likened *gharar* affecting a particular quality of something to *gharar* with respect to the thing itself (*al-gharar fī'l-ṣifa shabbahahu bi'l-gharar fī' ayn al-shay'*).”¹⁴⁰ The argument relates the conception of existence as

¹³⁷ Ibn Ḥazm, *Muḥallā*, vol. 8, p. 407, ¶. 1434. For other discussions of this prohibition in his writings, see vol. 8, p. 362, ¶. 1417; vol. 8, p. 458, ¶. 1471.

¹³⁸ Bājī, *Muntaqā*, vol. 6, p. 399; Ibn Qudāma, *Mughnī*, vol. 4, p. 157, ¶¶. 3061-3062; Shīrāzī, *Muhadhdhab*, vol. 3, p. 30.

¹³⁹ Sarakhsī, *Mabsūṭ*, vol. 12:4, p. 118.

¹⁴⁰ Ibn Rushd, *Bidāya*, vol. 3, p. 1198

such to systems of qualitative and quantitative description that I will examine below in more detail.

ii. Uncertainty with Respect to the Delivery

Just as jurists posit an inability to describe and measure the non-existent, they also relate the non-existent to the inability to deliver it. Sarakhsī, who has the greatest interest in the concepts of existence and non-existence in commercial law, states that, “Ownership is one of the attributes of existents but the non-existent can only be described as non-existent. Ownership is an expression of the ability to deliver the good.”¹⁴¹ For Sarakhsī, the non-existent cannot be validly owned or sold because one cannot deliver it or accurately describe it.

Bājī, Ibn Rushd, and Shīrāzī also indicate that this sale has uncertainty with respect to the ability to deliver. Whereas Bājī states this specifically in a discussion about the sale of an animal on the condition that it be pregnant, the other two jurists simply imply it.¹⁴² In particular, as we saw in his typology, Ibn Rushd treats uncertainty

¹⁴¹ Sarakhsī, *Mabsūṭ*, vol. 15:5, p. 109. The Arabic reads, *wa'l-milk min ṣifāt al-mawjūdāt fa'l-ma'dūm lā yūṣaf bi-shay' siwā annahu ma'dūm wa'l-milk 'ibāra 'an al-quḍra*. I base my understanding of the word *quḍra* as the ability to deliver on the fact that two lines before this quotation, he states that a compensatory contract requires the exchange of ownership of property and the delivery of the property. In addition, in the beginning of the same chapter on leases and hires, he states that the validity of this contract does not rest on the existence and ownership at the time the contract is entered into, but on the ability to deliver (*al-quḍra 'alā al-taslīm*), vol. 15:5, p. 74. Ibn Rushd also uses the word *quḍra* in his discussion of *gharar* to mean the ability to deliver a good, Ibn Rushd, *Bidāya*, vol. 3, p. 1198. Finally, al-Shīrāzī uses the verb *qadara* in his discussion of the *gharar* to mean the ability to deliver a good, *Muhadhdhab*, vol. 3, p. 33.

¹⁴² Bājī, *Muntaqā*, vol. 6, p. 399.

associated with the existence of the good and the ability to deliver it as one category.¹⁴³ Shīrāzī states that the sale of “the non-existent is something whose condition and ultimate outcome are unknowable.”¹⁴⁴ This brief statement indicates that this sale has uncertainty with respect to the present and futures states of the good, which might hinder its delivery.

To the best of my knowledge, neither Ibn Ḥazm nor Ibn Qudāma equates the sale of the non-existent with uncertainty of the delivery of the good. Ibn Ḥazm explicitly argues that uncertainty associated with the ability to deliver the good does not cause *gharar* as we will see. As for Ibn Qudāma, the reason for his neglect of this issue is unclear since he does agree that uncertainty with respect to delivery causes *gharar*.

iii. Uncertainty with Respect to the Delivery Date

Only Ibn Qudāma and Bājī explicitly address how the sale of the non-existent creates uncertainty in terms of its delivery date. Ibn Qudāma forbids the sale of the offspring of the offspring since it is the sale of the non-existent, which he claims engenders uncertainty with respect to the delivery date. With this sale, the exact delivery date cannot be specified at the time when counterparties enter into the contract.¹⁴⁵ Bājī also forbids this transaction since long dated contracts entail an impermissible level of uncertainty with respect to ultimate date of delivery.¹⁴⁶ Both jurists are concerned with

¹⁴³ Ibn Rushd, *Bidāya*, vol. 3, p. 1198.

¹⁴⁴ Admittedly, the Arabic is problematic, but this sentence appears to parallel his definition of *gharar* which he gives two lines earlier, “*al-gharar mā inṭawā ‘anhu amruhu wa-khafā ‘alayhi ‘āqibatuhu.*” Shīrāzī, *Muhadhdhab*, vol. 3, p. 30.

¹⁴⁵ Ibn Qudāma, *Mughnī*, vol. 4, p. 157, ¶. 3061.

¹⁴⁶ Bājī, *Muntaqā*, vol. 6, p. 359.

temporal uncertainty in this transaction, yet they formulate their concern in different ways. To remedy the uncertainty in this instance Ibn Qudāma requires a fairly narrowly defined delivery date to avoid uncertainty. Bājī, by contrast, emphasizes that any increase in the specific period of the delivery is directly proportional to an increase in the level of *gharar*.

iv. Conclusion

For most of the jurists examined in this chapter, the non-existent presents uncertainty in regard to the delivery of the good, its description, and its delivery date. Existence in commercial law is thus correlated against these three qualities. Nevertheless, the sale of the non-existent raises questions about how jurists define each form of uncertainty associated with *gharar*, and the application of these forms of uncertainty to describe the legality of specific transactions. The rest of this chapter will address the first question whereas the remaining chapters will examine the second question.

c. Typology of Sales

Gharar primarily arises within sales, although to a lesser extent it occurs in the context of partnerships and agency relationships as well. In order to better understand the forms of uncertainty that I will analyze below, a brief overview of the different types of sales is required. In general, jurists distinguish between a sale of a good that is present during the bargaining session (*bay' al-ḥādir*), and one that is not present at the bargaining session (*bay' al-ghā'ib*) but is to be delivered at later a date. The first type covers

currency exchanges and conventional cash transactions. The second type refers to the *salam* and *bay' al-ajal* contracts, or a pre-paid forward contract and credit sale respectively.¹⁴⁷ The latter type of sales presents the following three forms of uncertainty: 1) that associated with the quantity and description of the good, 2) that associated with the delivery of the good, and 3) that associated with the delivery date.

Although the second type of sales presents several forms of uncertainty, *gharar* can also occur in the first type of sales, as I will show in the following chapter in more detail. More importantly, even though jurists acknowledge that the *salam* contract involves uncertainty, they permit it. Jurists thus distinguish the traits that the *salam* contract possesses from contracts with *gharar*. Due to the resonances between the forms of uncertainty that cause *gharar* and potential for uncertainty with respect to the *salam* contract, I rely upon the jurists' discussions about the *salam* contract in order analyze *gharar* as it affects both types of sales.

III. Primary Forms of Uncertainty

a. Uncertainty with Respect to the Delivery Date

Uncertainty with respect to the delivery date primarily affects transactions like the *salam* contract and credit sales, which have delayed either the delivery of the good of the contract or the payment of the contract. As with many of the causes of *gharar* considered as contract terms, it seems commonsensical that a creditor will want to know

¹⁴⁷ For systematic discussions of the distinction between these two types of sales, see Bāji, *Muntaqā*, vol. 6, p. 284, Ibn Ḥazm, *Muḥallā*, vol. 8, pp. 336-337, ¶ 1411; Ibn Rushd, *Bidāya*, vol. 3, pp. 1159, 1211.

when he will be paid or take delivery of his good.¹⁴⁸ Nevertheless, to state that the delivery date is undefined (*majhūl*) or defined (*ma'lūm*) implies a number of anterior systems of knowledge about how to specify the delivery date, which calendar system to employ, and how the length of time affects *gharar*. In other words, a number of systems of knowledge define this form of uncertainty. Notwithstanding the fact that these issues of the delivery date are interrelated, I will examine each one separately.

i. Date Selection

Although jurists prohibit uncertainty with respect to the delivery date, they differ regarding the definitions of uncertainty and certainty in this context. All of them examine events upon which the delivery date may be contingent. For example, Bājī permits the stipulation of delivery on the distribution of the '*aṭā*', or payday of soldiers, since the date is known and delivery is due on that date regardless of whether the government pays the soldiers or not. He also permits stipulating the delivery upon the return of a pilgrim from *hajj* or the harvest of a specific crop. As for the harvest, Ibn Rushd states that this has a minimal amount of *gharar* since the date of the harvest of a specific type of crop varies so little from year to year.¹⁴⁹ In other words, the historical occurrences of past harvests enable one to forecast its probable future occurrences with enough certainty.

¹⁴⁸ Although Sarakhsī does not appear to explicitly equate this form of *jahl* with *gharar*, he requires the counterparties of *salam* to specify a delivery date. See, Sarakhsī, *Mabsūṭ*, vol. 12:4, pp.124-125.

¹⁴⁹ Bājī, *Muntaqā*, vol. 6, pp. 399-400; Ibn Rushd, *Bidāya*, vol. 3, p. 1300.

On the other hand, Shīrāzī and Ibn Ḥazm grant no role to probability in these cases. According to Shīrāzī, the date is uncertain if the counterparties stipulate it with reference to the payday of soldiers or return of a particular pilgrim.¹⁵⁰ Ibn Ḥazm argues that, “The harvest may be a few days earlier than expected if there was a lot of rain or later if was dry. As for the ‘*aṭā*’, that may be cancelled altogether.”¹⁵¹ Furthermore, Shīrāzī and Ibn Ḥazm interpret contracts literally so as to require the actual payment of the soldiers before the delivery of the good of the contract. If the payment date comes but the government defaults on paying the soldiers, Shīrāzī and Ibn Ḥazm argue that the seller does not have to deliver the good since the stipulation makes the delivery contingent on the actual payment of the soldiers. Although it is unsurprising that a Zāhirī jurist would reject inductive reasoning in issues of law, it is somewhat surprising that a Shāfi‘ī jurist, supposedly the great champions of analogy and probabilistic reasoning that necessarily entails notions of contingency, would take the same position.

As for delivery on a fixed date, Bājī permits the counterparties to pick a particular day in the month, otherwise if they specify only the month the delivery is assumed to be due on the first day of the month.¹⁵² Ibn Qudāma states that one may either specify a particular day of the month, some part of the month such as the beginning, middle, or end, or common Islamic holidays.¹⁵³ Finally, Ibn Ḥazm and

¹⁵⁰ Shīrāzī, *Muhadhdhab*, vol. 3, pp. 45-46.

¹⁵¹ Ibn Ḥazm, *Muḥallā*, vol. 8, pp. 444-445, ¶. 1464.

¹⁵² Bājī, *Muntaqā*, vol. 6, p. 306.

¹⁵³ Ibn Qudāma, *Mughnī*, vol. 4, p. 220, ¶. 3184.

Shīrāzī argue that the counterparties must specify the exact hour of a particular day.¹⁵⁴ Shīrāzī argues that if one were to stipulate the delivery on some day, month, or year there would be no reason to assume the specific moment that delivery is due since each moment could be the intended moment of delivery.¹⁵⁵ This ambiguity creates a level of uncertainty that Ibn Ḥazm and Shīrāzī deem unacceptable.

ii. Calendar Systems

Only Ibn Qudāma, Ibn Ḥazm, and Shīrāzī examine the role of the calendar system employed in delineating the certainty and uncertainty of the delivery date. Both Ibn Qudāma and Ibn Ḥazm agree that Muslims should employ the Islamic lunar calendar. As for the use of non-Islamic calendars, Ibn Qudāma divides these into two types. The first employs a solar calendar or non-Islamic holidays, which occur on the same days each year. Ḥanbalī jurists like al-Khiraqī and Ibn Abī Mūsā forbid the use of these calendars to stipulate a delivery date since they are not lunar months and “it is like one who enters into a *salam* contract for delivery on Palm Sunday or Passover, which is illicit because many Muslims do not know when these occur.” In fact, Palm Sunday and Passover are not celebrated on the same day of the solar year. On the other hand, Shīrāzī permits the use of these calendars and holidays since, he claims, they are well-known among Muslims.¹⁵⁶

¹⁵⁴ Ibn Ḥazm, *Muḥallā*, vol. 8, p. 445, ¶. 1464.

¹⁵⁵ Shīrāzī, *Muḥadhdhab*, vol. 3, pp. 171, 173.

¹⁵⁶ Ibn Qudāma, *Mughnī*, vol. 4, pp 220-221, ¶. 3184.

As for the second category, non-Islamic holidays that do not occur on a fixed day, but are contingent on an event like a moon sighting such as with Passover or Palm Sunday, Ibn Qudāma states that,

Muslims do not know when they occur and it is impermissible to follow non-Muslims whose claims are rejected since they make the holidays earlier or later on the basis of their own reckoning, which Muslim cannot know.¹⁵⁷

He then claims that both contracting parties must understand the date and system used to assign the delivery date.¹⁵⁸ Although he does not explain why a Muslim could not know these states, Ibn Ḥazm openly states that he distrusts non-Muslims to inform Muslims accurately about the occurrence of these holidays.¹⁵⁹ Although perhaps distasteful by contemporary standards, the views of Ibn Ḥazm and Ibn Qudāma reflect anterior views about the relations between Muslims and non-Muslims, which structure how these jurists define certainty and uncertainty in regard to the specification of the delivery date.

iii. Length of the Period

Only Bājī and Shīrāzī examine uncertainty in terms of the delivery date in regard to the length of time until the good is delivered. They discuss this issue in their treatments of the *salam* contract in which one party pays at the time of entering into the contract and takes delivery at a later date. According to Bājī, Ibn al-Qāsim found a delivery twenty

¹⁵⁷ Ibn Qudāma, *Mughnī*, vol. 4, p 221, ¶. 3184. *Li-anna al-muslimīn lā ya‘rifūnahu wa-lā yujāz taqlīd ahl al-dhimma fihi li-anna qawlahum ghayr maqbūd wa-li-annahum yuqaddimūnahu wa-yu‘akhhirūnahu ‘alā ḥisāb lahum lā ya‘rifuhu al-muslmūn.*

¹⁵⁸ Ibn Qudāma, *Mughnī*, vol. 4, p 221, ¶. 3184.

¹⁵⁹ Ibn Ḥazm, *Muḥallā*, vol, 8, p. 445, ¶. 1464.

years later reprehensible (*makrūh*), but he invalidated only transactions that had delivery dates for eighty or ninety years later. Such a distant delivery date presents uncertainty in regards to whether the counterparties will be alive.¹⁶⁰ On the other hand, Shīrāzī permits a *salam* contract in which delivery occurs on the same day of concluding the contract since it has less *gharar* than longer dated contracts.¹⁶¹

In addition to discussions about the length of delay in the delivery date, Sarakhsī and Shīrāzī also discuss how the length of time to the expiration of an option (*khiyār*) affects the level of *gharar*. Shīrāzī prohibits the buyer from having an option to cancel a sale more than three days after the completion of the contract due to excessive *gharar*. He bases his opinion on a *ḥadīth*, which he interprets to bear on the issue of *gharar*, that permits an option for at most three days. He reasons *a fortiori* that if three days is permissible than fewer days should be even more so due to less *gharar*.¹⁶²

Although the eponym of the Ḥanafī school and his students knew this *ḥadīth*, they took different stances on the maximum length of such an option. Abū Ḥanīfa permits a maximum length of three days whereas his students permit an option for any length of time as long as the period of the option's life is stipulated in the contract. On the basis of *qiyās*, some jurists prohibit any such option on the grounds that it possesses *gharar*. Sarakhsī, however, rejects this stringent view due to the aforementioned *ḥadīth* that

¹⁶⁰ Bājī, *Muntaqā*, vol. 6, p. 401.

¹⁶¹ Shīrāzī, *Muḥadhdhab*, vol. 3, pp. 162-163. Interestingly, Sarakhsī rejects the claim that a *salam* contract that is due immediately has less *gharar*, since he argues that the seller has less time to procure the good. Sarakhsī, *Mabsūṭ*, vol. 12:4, p. 126.

¹⁶² Shīrāzī, *Muḥadhdhab*, vol. 3, pp. 13-14. A discussion of the rules regulating options in the different schools of law is outside of the scope of this study.

permits an option of three days. Nevertheless, he states that this *ḥadīth* does not justify a longer period since, “the permissibility of the contract with a little bit of *gharar* does indicate the permissibility with respect to a lot of *gharar*.”¹⁶³

iv. Summary of the Discussions of Uncertainty with Respect the Delivery Date

In this section, I examined the epistemic systems that jurists employ to define the uncertainty associated with the delivery date. Although these jurists agree that uncertainty with respect to the delivery date can invalidate certain transactions, they disagree about the standards used to define this uncertainty. Bājī and Ibn Rushd have a minimalist standard of what constitutes certainty; whereas Ibn Ḥazm and Shīrāzī generally have a stricter one. However, the two sets of jurists employ different forms of reasoning and legal mechanisms in order to justify their positions. In the case of designating the harvest as the delivery date, Ibn Rushd and Bājī use the probability of the occurrence of events to define certainty.¹⁶⁴ In addition, Ibn Rushd and Bājī allow the date of the payday to be used to specify the delivery date. Ibn Ḥazm and Shīrāzī on the other hand, interpret this stipulation literally as requiring the payment of the soldiers in order to require the delivery of the good. Ultimately the definition of uncertainty and its contrary, certainty, are related to anterior discursive systems of dating, modes of reasoning, and

¹⁶³ Sarakhsī, *Mabsūt*, vol. 13:5, pp. 17, 41.

¹⁶⁴ Ibn Ḥazm’s rejection of probability here is in keeping with what Zysow refers as the materialist position of the Zāhirīs who rejected probabilistic knowledge (*ẓann*). Nevertheless, he notes that the definition of probabilistic knowledge changed over the centuries for them. See, Zysow, *Economy*, pp. 3-4.

hermeneutics. Thus, the definition of this form of uncertainty depends on a number of forms of knowledge to delineate its contours.

In addition, the discussions of Ibn Qudāma and Ibn Ḥazm acknowledge explicitly the role of convention in the definition of the contours of uncertainty and certainty. It is the counterparties' mutual knowledge that leads to certainty and consequently to the definition of uncertainty. Designating a delivery date is a discursive act that requires a shared practice among participants.

b. Uncertainty with Respect to the Description of the Good

All of our jurists agree that uncertainty with respect to the quality and quantity causes *gharar*.¹⁶⁵ The quantity and quality of a good are essential for valuing and more broadly representing a good in the eyes of jurists. According to Ibn Ḥazm, a legally binding contract requires the mutual consent (*al-tarāḍī*) of both counterparties, but consent cannot occur when either one or both counterparties are uncertain.¹⁶⁶ Below, I examine the forms of knowledge that jurists employ to define this form of uncertainty. Like the epistemic systems employed to define the delivery date, these systems are anterior to being employed to discussions of *gharar* such that knowledge enables the definition of this form uncertainty.

¹⁶⁵ In fact, there are several transactions where jurists allow an exchange although one of the countervalues is uncertain to both counterparties. We will examine the exceptions to this requirement in more detail in the following chapter.

¹⁶⁶ Ibn Ḥazm, *Muḥallā*, vol. 8, p. 341, ¶. 1413; p. 439 ¶.1461; v. 9, p. 20, ¶. 1524.

i. Uncertainty of the Quality

Most jurists employ the word *ṣifa*, or qualitative grade (henceforth simply quality), to discuss the information about a good that counterparties require.¹⁶⁷ The term “quality” implies a high resolution of descriptive knowledge about a good. In fact, Shīrāzī’s and Sarakhsī’s use of the terms *‘ayn*, or specific and tangible property, and *jins*, or genus, respectively suggest the need for this anterior descriptive information.¹⁶⁸ These requirements and varying technical vocabulary raise the following interconnected questions: 1) why is this form of uncertainty so important, 2) how does one acquire certainty with respect to the quality of a good, and 3) how does one describe a good with sufficient precision?

The answer to the first question is rather straightforward. An accurate description of the quality of the good allows one to value it. According to jurists, the description of the quality must be accurate enough to allow the counterparties to differentiate between the prices of similar goods.¹⁶⁹ The value of and description of a good are thus not absolute or intrinsic characteristics of it, but rather they are relational. For example, Bājī notes that a slight increase in the fat content of meat can double its price.¹⁷⁰

¹⁶⁷ Bājī, *Muntaqā*, vol. 6, pp. 36, 144,185, 216, 399,401, 405-406, 543; Ibn Ḥazm, *Muḥallā*, vol. 8, p. 389, ¶. 1421; p. 407, ¶. 1434; p. 458 ¶. 1471; Ibn Qudāma, *Mughnī*, vol. 4, p. 157, ¶. 3061; Ibn Rushd, *Bidāya*, v. 3, pp. 1198,1206, 1215.

¹⁶⁸ Shīrāzī, *Muhadhdhab*, vol. 3, pp. 34; Sarakhsī, *Mabsūt*, vol. 12:4, p. 163.

¹⁶⁹ Bājī, *Muntaqā*, vol. 6, pp 296-297; Ibn Qudāma, *Mughnī*, vol. 4, p. 207, ¶. 3158; Sarakhsī, *Mabsūt*, vol. 12:4, p. 136; Shīrāzī, *Muhadhdhab*, vol. 3, p. 170.

¹⁷⁰ Bājī, *Muntaqā*, vol. 6, p. 298.

As for the acquisition of certainty with respect to the quality of a good, one method is the visual inspection of it when the counterparties negotiate the contract. However, this method is problematic since fraud may subvert the value of an inspection. Furthermore, the Mālikīs argue that a more complex good like a house requires a substantial amount of time to analyze. The acquisition of certainty through sight is thus not certain or instantaneous in the context of commercial law, contrary to the claims of works of *uṣūl al-fiqh* and *kalām*, in which sensory data leads to necessary and immediate certainty.¹⁷¹

A verbal description of the good is another method to obtain certainty with respect to the quality of a good.¹⁷² In the introduction to this chapter, I noted that in works of *uṣūl al-fiqh* and *kalām*, authors generally claim that language maps perfectly onto thought and existence.¹⁷³ The relation between language, thought, and referent is, however, more complex in commercial law as we will see below in more detail.

Although Bājī claims that a visual inspection is a better method to obtain certainty with respect to the good, the other jurists suggest the equivalence between thought and

¹⁷¹ For examples of this claim, see Bājī, *Iḥkām*, pp. 170-171; Ibn ‘Aqīl, *Wāḍiḥ*, pp. 8-9; Ibn Qudāma, *Rawḍat*, pp. 13-14; Shīrāzī, *Sharḥ*, vol. 1, pp. 148-149. In fact, authors of these genres often recognize that the senses can be deceived. For example, although a shadow appears to be motionless, a careful study of it over a sufficiently long period of time reveals that it is constantly moving. See Abū Hāmid Muḥammad b. Muḥammad al-Ghazālī, *Al-Munqidh min al-dalāl* (Beirut: Commission Internationale pour la Traduction des Chefs-d’Oeuvre, 1959), pp. 12-13. ‘Aḍud al-Dīn ‘Abd al-Raḥmān b. Aḥmad al-Ījī, *Kitāb al-Mawāqif*, ed. ‘Abd al-Raḥmān ‘Umayra, 3 vols. (Beirut: Dār al-Jil, 1997), vol. 1, pp. 83-91.

¹⁷² Bājī, *Muntaqā*, vol. 6, pp. 285, 301, 364; Ibn Ḥazm, *Muḥallā*, vol. 8, p. 343, ¶. 1413; Ibn Qudāma, *Mughnī*, vol. 3, p. 496, ¶. 2773, vol. 4, pp. 211-212, ¶. 3164; Ibn Rushd, *Bidāya*, vol. 3, pp. 1211-1212.

¹⁷³ In chapter five, I will examine how the interaction of certainty from these two sources actually creates uncertainty.

communication with these two modes of acquiring certainty with respect to the quality of a good.¹⁷⁴

Nevertheless, Ibn Qudāma argues that an overly exact verbal description is not only unnecessary, but creates another form of uncertainty—that associated with the delivery of the good. According to him,

An exhaustive description (*istiḡṣā' kull al-ṣifāt*) is unnecessary because it is impossible (*yata'adhdhar*), and such a description might lead to a situation where the delivery of the good of the *salam* contract would become impossible since the existence of the good of the *salam* contract with all of those qualities upon the delivery date becomes improbable (*yab'ad wujūd al-muslim fihi 'ind al-mahall*)... because one of the requirements of a *salam* contract is that existence of its good should be widespread upon the delivery date.¹⁷⁵

This passage thus raises the astonishing paradox that more certainty simultaneously creates more uncertainty. Generally speaking, the acquisition of certainty is conceived of as step forward along a linear epistemological path. However, the typologization of the forms of uncertainty in discussions of *gharar* may create non-linear epistemological paths such that the acquisition of one form of certainty might increase a different form of uncertainty. This point is in keeping with my larger argument that certainty creates uncertainty. However in the context of *gharar*, jurists convert these non-linear interactions into a linear path through the ultimate subordination of all forms of uncertainty to the description and method of purchase of goods as I will show below in more detail.

¹⁷⁴ Bājī, *Muntaqā*, vol. 6, p. 301.

¹⁷⁵ Ibn Qudāma, *Mughnī*, vol. 4, pp. 211-212, ¶. 3164.

To determine which qualities of a good must be described in the contract, jurists develop a system of what I will refer to as “essential” qualities. Knowledge of these essential qualities through a verbal description makes a contract licit and provides the information required for a buyer to value the good instead of needing to inspect the good. Returning to Bājī’s example of the sale of meat in which a little change in the fat content of meat may double its price one would expect that jurists would require the most extensive description. However, Bājī notes that an exhaustive description of a good is unnecessary since many qualities do not affect its price. For example, extra lean meat seldom varies much in price from that of lean meat.¹⁷⁶ Thus we need a list of the essential qualities that would mediate both the analysis of a given good and its verbal description.

For the most part, jurists, however, do not elaborate such a comprehensive typology of goods and their essential qualities. Ibn Ḥazm, Ibn Rushd, and Shīrāzī merely state that the good must be described comprehensively (*yandabiṭ bi’l-ṣifa*) so as to allow one to discriminate between the prices of it and similar goods.¹⁷⁷ Bājī adopts a similar position, but adds that the description must also take into account the purpose of the good (*aghrād*).¹⁷⁸ This stipulation reflects the Mālīkī position that the usufruct more accurately defines an object than its common name does.¹⁷⁹ Sarakhsī states that the counterparties

¹⁷⁶ Bājī, *Muntaqā*, vol. 6, pp. 297-298.

¹⁷⁷ Ibn Ḥazm, *Muḥallā*, vol. 9, p. 113, ¶ 1620; Ibn Rushd, *Bidāya*, vol. 3, p. 1296; Shīrāzī, *Muhadhhab*, vol. 3, pp. 163-164.

¹⁷⁸ Bājī, *Muntaqā*, vol. 6, pp. 297-298. Thus the Mālīkīs allow one to trade goods with the same name unequally if they have different usufructs notwithstanding the prohibition on *ribā*.

¹⁷⁹ Bājī, *Muntaqā*, vol. 6, pp. 28-30.

must know the genus, species, and qualitative grade of the good.¹⁸⁰ Only Ibn Qudāma creates a typology of several different types of goods and the grades that must be defined in a contract.¹⁸¹ Nevertheless, his typology does not cover every conceivable object.

It seems puzzling that only Ibn Qudāma creates a typology of the essential traits of goods notwithstanding their importance for a valid sale. A cursory review of works of *shurūt*, or legal formula, which notaries used as reference works to draw up contracts, reveals more detailed lists of goods and their essential qualities that must be described for a contract to be valid. For example, Suyūṭī (849-906/ 1445-1501), the Shāfi‘ī polymath, includes a list of descriptions for numerous goods in his *shurūt* work.¹⁸² Aḥmad b. Muḡhīth al-Ṭulaytulī (d. 459/1067), a Mālikī jurist, even creates a typology of the descriptions of the charms of female slaves.¹⁸³ Nevertheless, this genre does not exhaustively typologize the descriptive qualities of all goods either.¹⁸⁴

Returning to sales, jurists disagree about which goods may be sold on the basis of a description. On the one hand, jurists argue that goods like grain and minerals may be

¹⁸⁰ Bājī, *Muntaqā*, vol. 6, p. 405; Sarakhsī, *Mabsūt*, vol. 12:4, p. 124.

¹⁸¹ Ibn Qudāma, *Mughnī*, vol. 4, pp. 212-216, ¶¶. 3165-3176.

¹⁸² Jalāl al-Din ‘Abd al-Raḥmān al-Suyūṭī, *Jawāhir al-‘uqūd*, ed. Mas‘ad ‘Abd al-Ḥamīd Muḡammad al-Sa‘danī, 2 vols. (Beirut: Dār al-Kutub al-‘Ilmiya, 1996), vol. 2, pp. 117-119. For more discussions of the descriptions of goods of the *salam* contract, see Abū Ja‘far Aḥmad b. Muḡammad Ṭaḡāwī, *Kitāb al-shurūt al-kabīr*, in *The Function of Documents in Islamic Law*, ed. Jeanette Wakin (Albany: State University of New York Press, 1972), 193-200.

¹⁸³ Aḥmad b. Muḡhīth al-Ṭulaytulī, *Al-Muḡni‘ fī-‘ilm al-shurūt*, ed. Francisco Javier Aguirre Sadaba (Madrid: Instituto de Cooperación con el Mundo Árabe, 1994).

¹⁸⁴ A far more interesting source for a typology of qualities of goods is a short epistle attributed to Jāhīz that discusses valuable goods like animals, gems, and fabrics. See, Abū Uthmān b. Baḡr al-Jāhīz, *Kitāb al-tabaṣṣur bi’l-tijāra*, ed. Ḥasan ‘Abd al-Waḡḡāb (Cairo: Dār al-Kitāb al-Jadīd).

sold on the basis of a verbal description. On the other hand, they disagree about other goods that cannot be sold on the basis of description. The distinction between goods that may be sold on the basis of verbal descriptions and those that may not relates to the distinction between fungible and non-fungible goods. Whereas fungible goods supposedly have an objective description, non-fungible goods do not.

For example, Bājī, Ibn Qudāma, and Shīrāzī agree that animals may be sold on the basis of a verbal description.¹⁸⁵ Only Ibn Qudāma outlines the qualities that must be described in order to sell animals.¹⁸⁶ On the other hand, Sarakhsī is skeptical about the ability to accurately describe animals. This is not because he is unaware of these systems of description. Rather, he claims that,

You can find two horses of the same age and quality but you will pay double for one of them due to some non-manifest reason like its gait or temperament... Thus if the animals cannot be categorized as essentially similar in terms of their monetary value by mentioning their traits then we hold that they cannot be sold in a transaction by a *salam* contract.¹⁸⁷

For Sarakhsī, these animals defy any description that would correlate their representation and their value since they possess traits that do not immediately manifest. More importantly, unlike fungible goods, the valuation of non-fungible goods depends on the subjective tastes of the buyer.

Sarakhsī's opinion implies that there are two models of representation if one wants to maintain the categories of objectivity and subjectivity as Sarakhsī's quotation

¹⁸⁵ Bājī, *Muntaqā*, vol. 6, p. 298; Shīrāzī, *Muhadhdhab*, vol. 3, p. 163.

¹⁸⁶ Ibn Qudāma, *Mughnī*, vol. 4, pp. 212-216, ¶. 3168.

¹⁸⁷ Sarakhsī, *Mabsūṭ*, vol. 12:4, pp. 132-133.

implies. With fungible goods, language maps onto thought so as to enable objective representations and valuations within legal discourse. In other words, language can accurately represent these goods such that a valid description of the good is legally and commercially equivalent to an inspection of it. On the other hand, with non-fungible goods, the good does not essentially mediate thought and language, rather our subjective values do. In this case, there is no objective means to describe the good such that different buyers would each assign the same price to the good. Rather, with non-fungible goods, buyers assign different prices to the same good due to their different personal values.

However, this distinction between the objective representations of fungible goods and subjective representations of non-fungible goods cannot be either objective or subjective. If this distinction had an objective basis then non-fungible goods would on some level have an objective representation. Conversely, if these distinctions were purely subjective then the fungible goods would not have representations that permit different people to reach the same valuations of these goods. Rather the distinction is ultimately discursive and reflects the different ways that jurists configure representation within commercial law.

ii. Uncertainty with Respect to the Quantity

Beyond a lack of knowledge about the quality of a good, jurists also agree that the quantity of the good of the transaction may not be unknown. By good, they mean not

only something like a dress, but also money, a countervalue of many trades.¹⁸⁸

Furthermore, they frequently pair uncertainty in terms of the quality of the good and its quantity in their discussions of *gharar*.¹⁸⁹ At first glance, one might suspect that uncertainty with respect to the quantity occurs when one sells a good without quantifying it. However, one may sell a pile of wheat without quantifying it (*juzāf*). This prohibition is further nuanced by the fact that even if one measures the good, this measurement might increase uncertainty as we will see in the fifth chapter.

Jurists recognize four forms of mensuration: counting, weighing, length measurement, and volumetric measurement. However, the method of measuring a specific object is a matter of convention. Shīrāzī and Sarakhsī argue that the counterparties must measure a specific object according to the method used for it in the Hejaz during the life of the Prophet. For example, if a good was sold by volume in the Hejaz during the Prophet's lifetime, it should be sold the same way today. If there is no report about how it was measured, Sarakhsī permits the use the convention (*'urf*) of a particular market.¹⁹⁰ Shīrāzī either uses *qiyās* to extend the methods of the Hejaz or follows the convention of a particular market.¹⁹¹ Ibn Qudāma adopts the view of Shīrāzī

¹⁸⁸ Bājī, *Muntaqā*, vol. 6, pp 26, 69, 247, 399-400; v.7, p. 94; Ibn Ḥazm, *Muḥallā*, vol. 8, pp. 444, ¶ 1464; vol. 9, p. 14, ¶. 1515; vol. 9, p. 21, ¶. 1526; vol. 9, p. 23, ¶. 1531; Ibn Qudāma, *Mughnī*, vol. 4, p. 229, ¶. 3198; Ibn Rushd, *Bidāya*, vol. 3, pp. 1198, 1208-1209, 1222; Shīrāzī, *Muḥadhdhab*, vol. 3, pp. 43-45.

¹⁸⁹ Bājī, *Muntaqā*, vol. 6, pp. 180, 333, 402-403; Ibn Ḥazm, *Muḥallā*, vol. 8, p. 389, ¶.1421; p. 407, ¶. 1434; p. 458, ¶. 1471; Ibn Qudāma, *Mughnī*, vol. 4, p. 157, ¶. 3062; Ibn Rushd, *Bidāya*, vol. 3, pp. 1198, 1206, 1216-1217; Sarakhsī, *Mabsūt*, vol. 12:4, p. 163.

¹⁹⁰ Sarakhsī, *Mabsūt*, vol. 12:4, p. 142. For a study of weights and measures in the Islamic world, see EI², s.v. *Makāyil*; Walther Hinz, *Islamische Masse and Gewichte: Umgerechnet ins metrische System* (Leiden: Brill, 1955).

when it comes to the exchange of any good subject to the prohibition against *ribā*; otherwise, the counterparties may employ any system since “the goal is knowledge of the quantity of a good and the removal of any uncertainty about it (*ma‘rifat qadrihi wa-khurūjuha min al-jahāla*).¹⁹² Bājī presents the following typology of systems of measurement:¹⁹³

- A. Legal mode of measurement based on a revealed textual source
- B. Non-legal conventional measurement
 - 1. Conventional method uniform in all lands
 - 2. Conventional method varies in all lands
- C. No method of measurement.

Ibn Rushd merely states that one should use the conventional mode of measurement and instrument with every object.¹⁹⁴ For example, a good that is measured by length must employ the standardized market ruler rather than someone’s arm since if the person whose arm was used to measure the good died the good could not be delivered as specified by the contract.¹⁹⁵

¹⁹¹ Shīrāzī, *Muhadhdhab*, vol. 3, pp. 69-71.

¹⁹² According to Ibn Qudāma, this is also the view of the Shāfi‘īs and Mālikīs notwithstanding the fact that our jurists from these schools clearly indicate that counterparties must follow the conventional system for each good with a *salam* contract. Ibn Qudāma, *Mughnī*, vol. 4, p. 16, ¶ 2812; pp. 216-217, ¶¶ 3177-3178.

¹⁹³ Bājī, *Muntaqā*, vol. 6, p 327.

¹⁹⁴ Ibn Rushd, *Bidāya*, vol. 3, pp. 1301.

¹⁹⁵ According to Bājī, Ibn al-Qāsim permits counterparties to use a specific person’s arm to measure cloth, but his student Aṣḥab argues that this introduces uncertainty which invalidates the contract; *Muntaqā*, vol. 6, p 305. For the views of our other jurists, see Ibn Qudāma, *Mughnī*, vol. 4, pp. 216-217, ¶. 3177; Sarakhsī, *Mabsūt*, vol. 12:4, p. 152; Shīrāzī, *Muhadhdhab*, vol. 3, p. 169.

iii. Conclusion of the Discussion of Uncertainty with Respect to the Good

Uncertainty in terms of the description and quantity presumes a number of prior systems of description and mensuration. Besides relating this form of uncertainty to the analysis of the legality of a transaction, jurists also relate it to the valuation of the good. To know the quality and quantity of a good is to be able to value it. However, jurists claim that valuation works upon a principle of the essential qualities of goods rather than an exact and comprehensive representation of a good. At first glance, this implies that a good governs the system of representation like the Aristotelian model of representation that I examined in the introduction to this chapter. However, the fact that language cannot adequately and objectively represent non-fungible goods draws into question both the standard model of representation and objectivity of categories like certainty and uncertainty. Rather, the analysis of uncertainty with respect to quality and quantity reveals that it is the discursive practices that communities adopt that determine the distribution of certainty and uncertainty.

c. Uncertainty with Respect to Delivery

With the exception of Ibn Ḥazm, who has a unique theory of ownership, which I will examine in the following chapter, the other jurists prohibit the sale of what cannot be delivered (*bay' mā lā yuqdar 'alā taslimihi*) due to excessive *gharar*.¹⁹⁶ Uncertainty with respect to the delivery of the good forms the last of primary causes of *gharar*.

¹⁹⁶ Bājī, *Muntaqā*, vol. 6, pp. 284, 399-401; Ibn Qudāma, *Mughnī*, vol. 4, pp. 151-152, ¶¶. 3048-3050; Ibn Rushd, *Bidāya*, vol. 3, p. 1198; Sarakhsī, *Mabsūt*, vol. 11:4, p. 22; Shīrāzī, *Muhadhdhab*, vol. 3, pp. 33-34,43.

Discussions of this prohibition typically revolve around a comparison of the legality of the *salam* contract to the illegality of the sale of a runaway slave, a bird in flight, and a fish in water. It is tempting to compare this form of uncertainty to modern conceptions of credit risk since both discourses examine whether a lender will be repaid. However there is an important difference between uncertainty with respect to delivery and credit risk. Analysis of credit risk focuses on the solvency of the debtor. Jurists primarily analyze this form of uncertainty in terms of 1) the fungibility of the good and 2) the legal and economic effects of non-delivery. Although these two epistemic systems that jurists employ are not mutually exclusive, they have different functions as we will see.

i. Fungibility

For most jurists, the fungibility of a good defines uncertainty in terms of its delivery. According to Bājī, *gharar* occurs in the case of the sale of a specific runaway slave since the seller does not physically possess the slave (*bay' mā laysa 'indahū*) and thus cannot guarantee its delivery, with the result that “the impossibility of taking possession of the good is feared (*mā yukhāf min ta'adhdhur qabḍihi*).”¹⁹⁷ No sooner does Ibn Qudāma express the same prohibition than he affirms the legality of the *salam* contract since its goods must be fungible. Unlike with a non-fungible good, with a fungible good “the effort required to transport it is generally known, and the total time of delay of the delivery is known.”¹⁹⁸ As for a specific bird in flight, there is uncertainty

¹⁹⁷ Bājī, *Muntaqā*, vol. 6, pp. 284; 399.

¹⁹⁸ Ibn Qudāma, *Mughnī*, vol. 4, p. 151, ¶. 3049. The Arabic reads, “*tu'lam al-kulfa allatī yaḥtāj ilayhi fī iḥḍārihi bi'l-'āda wa-ta'khīr al-taslīm muddatuhu ma'lūma.*” Admittedly, in the

associated with the possibility of capturing it. Even if one could guarantee its capture, this would require an uncertain amount of labor and time. Ibn Qudāma does permit the sale of a bird that is in a cage, or of a fish that is in a small tank with clear water since the labor and time required to capture either animal are minor.¹⁹⁹

Ibn Qudāma and Bājī focus on several issues related to the fungibility of the good in order to define this form uncertainty. First, *gharar* occurs due to uncertainty associated with physically obtaining a non-fungible good. Second, the amount of labor required to obtain the good is unknown. Considering this labor should be a component in the quoted price, this uncertainty would further affect the value of the contract. Third, the time required to obtain and deliver the good is unknown. Fourth, although a *salam* contract may require a tremendous amount of labor, these jurists argue that this labor can be known when the contract is struck.

ii. Legal and Economic Effects

Ibn Rushd's analysis relates this form of uncertainty to that associated with the nature of the contract. Like the other jurists, he prohibits the sale of a runaway slave due to excessive *gharar*. However, if the seller knows the location of the slave, the two parties may enter into the transaction but not exchange money. In effect, knowledge of the slave's location partially restores the owner's right to dispose of his property since the delivery of the slave seems possible from the perspective of Ibn Rushd. If the buyer were

¹⁹⁹ Ibn Qudāma, *Mughnī*, vol. 4, pp. 151-152, ¶¶. 3049-3050. Admittedly in the *Kāfi* he states that these sales are licit as long as they require no labor. See Ibn Qudāma, *Al-Kāfi fī fiqh li'l-imām al-muḥayyal Aḥmad Ḥanbal*, 3 vols. (N.P.: Al-Manshūrāt al-Maktab al-Islāmī, ND.), vol. 2, p. 11.

to pay before taking possession of this slave “the contract would vacillate between being a sale and a loan.”²⁰⁰ In other words, if the buyer gets the slave as described the sale is completed. On the other hand, if he does not, the seller effectively receives an interest-free loan until he returns the buyer’s pre-payment. Thus, this form of uncertainty potentially leads to another uncertainty—uncertainty about whether the contract is a sale or interest free-loan.

The reasoning of Ibn Rushd, however, focuses on the effects of this form of uncertainty whereas the previous explanations focus on the causes. Undoubtedly the causes and effects are connected. By defining the causes of this form of uncertainty, one can avoid it at the time of contracting. However, by focusing on the effects, one cannot determine whether a transaction has uncertainty until the actual failure to deliver the good occurs. Ibn Rushd’s analysis thus does not describe how to avoid this form of uncertainty, but merely justifies the prohibition.

iii. Mixed Discourses

By combining elements of the analyses of Ibn Rushd and Ibn Qudāma, Shīrāzī’s analysis of these transactions acknowledges the uncertainty that both counterparties face. For the buyer, he focuses on the effects associated with this form of uncertainty. The whole point of a sale is for the buyer to obtain full disposition over the good (*al-qaṣd bi’l-bay’ tamlīk al-taṣarruf*), but with the sale of a good whose delivery is uncertain, this ability is jeopardized. As for the seller, he examines the sale of a bird in a locked cage

²⁰⁰ Ibn Rushd, *Bidāya*, vol. 3, pp. 1198,1215.

and of a fish in a tank in a manner similar to Ibn Qudāma to qualify the amount of labor required to deliver the fish or bird.²⁰¹

Likewise, Sarakhsī's discussion combines many of the elements of the previous discussions, but he also introduces the ontological categories of *mawjūd* and *ma'dūm*, or existent and non-existent, respectively. According to him, the sale of a runaway slave creates *gharar* since, "Neither how long he will remain in this state, nor whether he will return so that he can be delivered is truly known."²⁰² Furthermore, he states that, "the monetary value of the runaway slave is like that of one in the grave. It as though he does not really exist."²⁰³

Sarakhsī's discussion about a *salam* contract for food offers further insight into what it means to be able to deliver a good. He argues that the ability to deliver a good is based on the ability to obtain it or the coming harvest (*bi'l-takassub aw bi-majī' zamān al-ḥiṣād*).²⁰⁴ In addition, he explains the prohibition against a *salam* contract for fruit from a particular garden by stating that,

The obligation of delivery is required for the permissibility of the contract, and one does not know one's ability to deliver this fruit when its delivery is due except by the existence of the fruit on those trees or in the specified orchard. The future existence of that fruit is based upon pure speculation, which does not establish the ability to deliver the fruit.²⁰⁵

²⁰¹ Shīrāzī, *Muhadhdhab*, vol. 3, pp. 33-34.

²⁰² Sarakhsī, *Mabsūṭ*, vol. 11:4, p. 22. *Lā yu'lam baqā'uhu fī al-ḥāl ḥaqīqatan lā 'awduhu li-yuqdar 'alā al-taslīm.*

²⁰³ Sarakhsī, *Mabsūṭ*, vol. 13:5, p. 10. *Al-mālīya fī'l-ābiq thāwiya ka'l-ma'dūm ḥaqīqatan.*

²⁰⁴ Sarakhsī, *Mabsūṭ*, vol. 12:5, p. 126.

²⁰⁵ Sarakhsī, *Mabsūṭ*, vol. 12:5, p. 130. *Wujūb al-taslīm sharṭ li-jawāz al-'aqd wa-lā ya'lam qudratahu 'alā al-taslīm 'inda ḥulūl al-ajal illā bi-wujūd al-thimār fī tilka al-nakhla aw*

The quotation indicates that not only does the very existence of the good factor into the analysis of the ability to deliver it, but so does its fungibility. As shown in discussions of uncertainty associated with the description of the good, the jurists do not agree about which goods are fungible. Rather, the classification of the fungibility of a good depends on a wider set of considerations than the mere good itself.

Sarakhsī's focus on the existence of the good also reflects the fact that the Ḥanafīs are generally more conservative in terms of defining a good as existing. Due to his conservativeness with defining the existence of goods, Sarakhsī tends to have a wider definition of uncertainty with respect to the existence of goods. Unlike the other schools, the Ḥanafīs require that the goods of a *salam* contract exist somewhere from the moment that the counterparties enter into a transaction until its delivery date since the contract becomes due immediately upon the death of either counterparty.²⁰⁶ The other schools require only that the existence of the good be likely at the delivery date.²⁰⁷ This extreme aversion to uncertainty with respect to the existence of goods runs contrary to the general portrayal of Ḥanafīs as being more tolerant of forms of knowledge and methods of reasoning that the other schools view as probabilistic as best.

al-ḥā'it alladhī 'ayyanahu wa-wujūd dhālika mawhūm wa-bi'l-mawhūm lā tathbut al-qudra 'alā al-taslīm.

²⁰⁶ Sarakhsī, *Mabsūṭ*, vol. 12:4, p. 131.

²⁰⁷ Bājī, *Muntaqā*, vol. 6, p. 309; Ibn Ḥazm, *Muḥallā*, vol. 9, pp. 114-115, ¶ 1621; Ibn Qudāma, *Mughnī*, vol. 4, pp. 151-152, ¶¶ 3049-3050; Shīrāzī, *Muhadhdhab*, vol. 3, p. 168.

d. The Interaction of the Primary Forms of Uncertainty

In the section about uncertainty associated with the quality, I cited Ibn Qudāma, who prohibits an overly exact description of the good since this increases the uncertainty associated with its delivery. As a good becomes conceived of as increasingly unique rather than as a member of a class of goods, the uncertainty associated with its delivery increases. However, these forms of uncertainty are not always inversely related. Rather their relationship depends on the nature of the good and method of sale. As indicated above, both forms of uncertainty vanish in the case of a good sold on the basis of a visual inspection. Even if delivery of the good sold on the basis of a visual description occurs at a later date, jurists assume that there is no uncertainty associated with this later delivery. True, the good may be destroyed through some act of God and wipe out the seller's wealth, but this form of uncertainty occurs with any credit transaction from the perspective of jurists.

Furthermore, fungible goods present no uncertainty with respect to the ability to describe and deliver them. Conversely, non-fungible goods that are not present at a transaction give rise to all forms of uncertainty. However, jurists forbid precisely the sale of a non-fungible good that is not present when the counterparties enter into the contract due to the non-linear interactions of these forms of uncertainty.

IV. Secondary Causes

Uncertainty associated with the actual delivery date, quality and quantity of the good, and delivery constitute the primary causes of *gharar*. However, in the section on the typology of the causes of *gharar*, we saw that some jurists have a wider set of causes

for *gharar*. In fact, some of these additional causes of *gharar* are forms of uncertainty. In order to appreciate the relation of these other forms of uncertainty to those forms examined above, I will examine how jurists describe and employ these other forms of uncertainty. A careful analysis of these other forms of uncertainty reveal that they are derived from the three forms of uncertainty examined in the previous section. I refer to these other forms of uncertainty as secondary whereas the three forms of uncertainty examined the previous section I refer to as the primary forms of uncertainty.

This distinction between primary and secondary causes of *gharar* reflects a hierarchy of the forms of uncertainty associated with *gharar*. In other words, the forms of uncertainty associated with *gharar* mirror the ability of forms of certainty to create hierarchies that relate one form of certainty to another to create a form of rationality. In chapter four, I will explore the rationality of *gharar* in more detail.

a. Sale of Non-Possessed Goods

According to our jurists, one may not sell a good that one does not possess. They employ a variety of phrases to express this prohibition: the sale of what one does not have (*bay' mā laysa 'indahū*), the sale of a good that one has not taken legal possession of (*qabḍ*), and the sale of what one does not own. Notwithstanding the categorical nature of this prohibition, jurists no sooner pronounce it then they state that the *salam* contract and the *ijāra*, or contract of lease and hire, are exceptions to this prohibition. Although most of our jurists explain this prohibition with reference to uncertainty associated with the delivery, there are some notable exceptions.

i. Uncertainty with Respect to the Delivery

Without much fanfare, Shīrāzī states that due to inability to ensure delivery, one cannot sell what one does not own.²⁰⁸ Although Sarakhsī and Ibn Qudāma adopt the same general reasoning, they restrict the scope of this prohibition by creating a typology of the goods to which it applies. According to Sarakhsī, one cannot sell moveable property that is not in his possession due to the inability to guarantee its delivery.²⁰⁹ This property may be destroyed before the seller or final buyer takes possession of it, or someone else may lay claim to it (*istiḥqāq*). However, once the buyer takes possession of it, *gharar* due to its potential destruction ceases to be a concern. On the other hand, he permits the sale of immovable property before the buyer takes possession of it since the potential for its destruction is deemed unlikely. Although someone may claim this property, this risk is unavoidable so that it is not taken into account in the legal analysis of these sales.²¹⁰ Thus Sarakhsī distinguishes between forms of uncertainty that affect all transactions and cannot be mitigated, and those forms of uncertainty that are unique to some transactions and can be mitigated.

According to Ibn Qudāma, the Ḥanbalīs, however, disagree about the goods that are subject to this prohibition against selling what is not in one's possession. On the one hand, Ibn Ḥanbal adopts the Mālikī position that one may sell fungible non-food goods before taking possession of them. On the other hand, Khiraqī extends this prohibition to non-food goods sold by weight, measure, or number. Ibn Qudāma reconciles these

²⁰⁸ Shīrāzī, *Muhadhdhab*, vol. 3, p. 31.

²⁰⁹ Sarakhsī, *Mabsūṭ*, vol. 13:5, p. 8.

²¹⁰ Sarakhsī, *Mabsūṭ*, vol. 13:5, p. 9.

positions by prohibiting the sale of only food sold by weight, measure, or number before one has take possession of it, such as in the case of a dowry. In addition, this prohibition applies only to goods purchased through a *salam* contract.²¹¹ Notwithstanding the fact that the fungibility of the goods of a *salam* contract ensures the ability to deliver them, Ibn Qudāma prevents the buyer from hedging a *salam* contract through another one. According to him, with the *salam* contract, the buyer may only sell a good once he becomes liable for it since both contracts must be invalidated if the good were destroyed.²¹² This point about liability is important since when one purchases a good by means of a *salam* contract the seller remains liable for the loss of the good or damage to it until he delivers it to the buyer who takes possession of the good. From Ibn Qudāma's perspective, if one sells a good before he is liable for it he has earned a profit without any risk. Furthermore, this prohibition prevents the proliferation of the credit risk that would arise from chains of interconnected contracts through an economy. Finally, with non-fungible goods, ownership immediately transfers to the buyer whether he physically takes possession of them or not.²¹³ Thus, if a buyer inspects a non-fungible good, pays for it through a *salam* contract, but does not take he still is liable for it.

ii. Double Sales and Certainty

Bājī prohibits the sale of what one does not possess for two reasons that have contrary epistemological implications. First, he prohibits the sale of non-fungible goods

²¹¹ Ibn Qudāma, *Mughnī*, vol. 4, p. 85, ¶. 2934; p. 227, ¶3195.

²¹² Ibn Qudāma, *Mughnī*, vol. 4, p. 87, ¶. 2940.

²¹³ Ibn Qudāma, *Mughnī*, vol. 4, pp. 82-83, ¶. 2929.

by a *salam* contract due to uncertainty with respect to their delivery.²¹⁴ Second, he prohibits the *bay' al-'īna*, or repurchase sale with food that one does not own. This type of sale combines several licit transactions like a conventional contract of sale, a *salam* contract, and a *bay' al-ajal* (credit sale) in order to synthesize prohibited transactions that have cash-flows that replicate those of illicit interest-bearing loans and forward contracts. These synthetic transactions arise because the Mālikīs permit the sale of fungible non-food goods that one does not possess.²¹⁵

However, the Mālikīs prohibit the sale of food through these transactions since they claim that people know the future value and price of food with enough certainty to create an arbitrage, or riskless profit.²¹⁶ In other words, Ibn Rushd and Bājī paradoxically claim that the sale of food before one has taken possession of it has *gharar* due to too much certainty about the future price and ability to deliver the good.

These apparently contradictory reasons for banning the sale of what one does not possess reflects a reconfiguration of two legal domains. On the one hand, early jurists permitted the sale of certain fungible goods before one possessed them, but prohibited it with food in order to prevent people from engaging in regulatory arbitrage or speculation on the price of food. In particular, during the first century of Islam, people used to speculate on the price of grain by buying and selling the checks that entitled soldiers to their future stipend payments of grain.²¹⁷ At a later point, probably through the

²¹⁴ Bājī, *Muntaqā*, vol. 6, p. 284.

²¹⁵ Bājī, *Muntaqā*, vol. 6, pp. 270-273.

²¹⁶ Bājī, *Muntaqā*, vol. 6, pp. 273-274; Ibn Rushd, *Bidāya*, vol. 3, p. 1209.

²¹⁷ Coulson, *History*, 38-39.

acceptance of a *ḥadīth* that prohibited the sale of what one does not possess due to *gharar*, they classified the sale of food that one does not possess as *gharar* in order to strengthen the claim of this transaction’s prohibition. Nevertheless, they maintain the permissibility of selling non-food fungible goods notwithstanding the apparent legal contradiction.

iii. Uncertainty with Respect to the Good

Finally, Ibn Ḥazm’s discussion of this prohibition is more ambiguous than those of the preceding jurists. In his analysis of a Ḥanafī position that allows government tax-collectors to take the countervalue of goods that are subject to *zakāt*, rather than taking payment in kind, he argues that this is effectively like selling a good before taking possession of it.²¹⁸ According to him, “this is truly the sale of *gharar* because one does not know what he is selling or the value of what he is taking.”²¹⁹ Since the tax collector does not truly take possession of the good, he has in effect taken a countervalue without certain knowledge of the value of the good that he has forgone. For this reasoning to hold, one must accept the implicit claim that the tax-collectors are not knowledgeable about the value of goods like grain, fruit, and animals. Second, one might infer that Ibn Ḥazm was unaware of or rejected the notion that collecting, transporting, and selling taxes collected in kind has costs and potential risks that the tax-collectors wanted to

²¹⁸ *Zakāt* is obligatory tax on variety of assets. With the exception of the Ḥanafīs, the other schools require that the tax on a good be paid in kind which made tax collection far more complex and costly for the government. For further details, see EI², s.v. *Zakāt*.

²¹⁹ This translation is conjectural. The Arabic reads, “*hādhā bay‘ al-gharar ḥaqqan li-annahu lā yadrī mā bā‘a wa-lā ayyuhā bā‘a wa-lā qīmat mādhā akhadha.*” Ibn Ḥazm, *Muḥallā*, vol, 8, p. 390, ¶. 1421.

avoid. On the other hand, it is possible that he wanted the tax-collectors to collect the taxes in kind as way of protecting tax-payers from the arbitrary monetary assessments of the tax-collectors.

However, Ibn Ḥazm also applies this reasoning to when a purchaser knows the good that he will receive, but sells it before taking possession of it. During a discussion of the *iqāla*, which most jurists claim is the cancellation of a *salam* contract, Ibn Ḥazm argues that the word *iqāla* cannot mean cancellation since that would be the sale of what one does not possess and the sale of what is unknown, which is *gharar*.²²⁰ Elsewhere he states that,

This is the sale of what you do not possess, sale with *gharar*, sale of what has not been taken possession of, and the uncertain sale is what is unknown to exist in the world (*bay' mā laysa 'indaka wa-bay' al-gharar wa-bay' mā lam yuqbaḍ wa-bay' majhūl lā yudrā ayyumā fī al-'ālam huwa*).²²¹

Although not clearly explained, the ability to cancel a sale undermines the agreed upon price of transaction and enforceability of contracts in general. Each party would have an incentive to cancel the transaction if the price of the good subsequently changes in the market. For example, if the price rose before the delivery of the good, the seller might cancel the transaction and sell the good at the higher current market price. On the other hand, if the price fell, the buyer might cancel the transaction and buy the good at the lower current market price. In effect, the ability to cancel the transaction would embed

²²⁰ Ibn Ḥazm, *Muḥallā*, vol, 9, p.115 , ¶. 1622.

²²¹ Ibn Ḥazm, *Muḥallā*, vol, 9, p.5 , ¶. 1509.

an option on the transaction for both counterparties and undermine the enforceability of contracts.

However, Ibn Ḥazm wants to ensure the enforceability of contracts since wealth and contracts have an inviolable status, which an option of cancellation threatens.²²² Ibn Ḥazm, a supposed literalist, rejects the literal meaning of the word *iqāla* as “cancellation.” Rather, he treats the word as a technical legal term whose exact meaning he cannot precisely define. He further justifies his position by invoking *gharar* and claiming that the cancellation creates uncertainty. By invoking *gharar*, he committed himself to explaining this prohibition within his discursive framework, which recognizes only uncertainty in terms of the delivery date and description of the good. Undoubtedly, it is true that the quantity of the price is uncertain due to the potential to cancel the contract. Ibn Ḥazm might have also added that the delivery is uncertain, but he does not recognize this as a form of uncertainty that voids contracts.

b. Idiosyncratic Forms of Secondary Uncertainty

Until now, I have examined types of uncertainty that most if not all of our jurists recognize as causes of *gharar*. Below, I will examine the forms of uncertainty that are idiosyncratic to a minority of jurists. Note that jurists employ the primary forms of uncertainty that I previously detailed in order to explain their idiosyncratic forms of uncertainty.

²²² Ibn Ḥazm, *Muḥallā*, vol, 9, pp.3-6 , ¶. 1509.

i. The Impossibility of Establishing Ownership

Both Shīrāzī and Ibn Ḥazm argue that the sale of a good whose ownership cannot be established (*ghayr mustaqarr*) creates excessive *gharar*. Notwithstanding the common usage of the term *istiqrār*, their analyses differ considerably. For Shīrāzī, this cause of *gharar* arises when one's ownership of a good is not settled such as with subleasing or the sale of a dowry that one does not yet possess. In these cases, ownership is not established due to the lack of possession, so if the good is destroyed it cannot be delivered and all related contracts are invalidated.²²³ For Shīrāzī, this issue is derivative of that of the sale of what one does not possess, which is itself derivative of uncertainty with respect to the delivery.

For Ibn Ḥazm, this form of uncertainty refers to the physical impossibility of taking possession of the good such as with the air rights over a building. According to him, one may not sell the air above a building or fence for someone to build on since,

The air is never fixed so that its ownership cannot ever be determined precisely (*lā yuḍbaṭ milkuhu abadan*). Rather it is constantly undulating so that some air is flowing out whereas some is flowing in constantly. Thus, the sale of this air is devouring wealth in vain and the buyer cannot take possession of it. Accordingly, this is the sale of *gharar*, the sale what one does not own, and the sale of the unknown.²²⁴

Like Shīrāzī, Ibn Ḥazm prohibits this sale due to the inability of the buyer to take possession of it. Although this inability mirrors the inability of the seller to deliver a good, Ibn Ḥazm does not establish this symmetry because he does not recognize

²²³ Shīrāzī, *Muhadhdhab*, vol. 3, p. 31.

²²⁴ Ibn Ḥazm, *Muḥallā*, vol, 9, p.19 , ¶. 1522.

uncertainty with respect to delivery as a cause of *gharar*. Rather, he explains this form of *gharar* in terms of the uncertainty associated with the description. To be precise, he argues that the air cannot be described due to its unstable nature.

Interestingly, Ibn Ḥazm presents two counterarguments to his position. One position states that the buyer is really buying the three dimensional space above the roof. According to another argument, the buyer is buying the surface of the roof in order to build upon it. However, Ibn Ḥazm retorts that the Qur'ān and *ḥadīth* do not validate any stipulation to destroy part of the surface.²²⁵ In other words, he argues that any addition to the roof would damage it. Both of his opponents' counterarguments would provide a tangible and defined substrate such that the ownership could be specified. Ibn Ḥazm's arguments attempt to undermine any claim that the space can be described and quantified.

The difference between his position and his opponents' reflects different methods for representing the goods of these transactions. In the coming chapters, I will demonstrate that goods are not passive entities that language and concepts can encapsulate so as to represent perfectly; a point already illustrated by the discussion of the uncertainty associated with the descriptions of goods indicated. Rather, the different discursive techniques that jurists employ to represent goods affect the ability to represent and relate these goods within a larger schema as we will see.

²²⁵ Ibn Ḥazm, *Muḥallā*, vol, 9, p.19 , ¶. 1522.

ii. Uncertainty with Respect to the Contract and the Good

Both Ibn Rushd and Bājī argue that *gharar* occurs when the terms of contract (*'aqd*) are not sufficiently defined. Ibn Rushd adds that the object of the contract (*al-ma'qūd 'alayhi*) cannot be undefined. Bājī only mentions uncertainty with respect to the contract and the good during his analysis of repurchase sales where counterparties know the goods and contract with certainty, as I showed above. In addition, he states that the pre-Islamic *bay' al-ḥaṣā*, in which one counterparty threw a stone and bought the object that it landed upon, is an example of this type of uncertainty. The problem with this sale is that the good of the sale is undefined at the time of the contract. Finally, he states that with the *'arbān*, which is analogous to a modern call option, in which the buyer gives the seller some money in order to have the right to buy the good at a specified price and date, is a form of *gharar*. The *gharar* probably occurs because the existence of an option implies that the sale will not necessarily become binding, which causes uncertainty.²²⁶

Notwithstanding the fact that Ibn Rushd lists this form of uncertainty within his typology of *gharar*, he does not explicitly deploy or develop it.²²⁷ In addition, those transactions that Bājī lists as examples of uncertainty associated with the contract, Ibn Rushd analyzes as examples of uncertainty associated with the description.

²²⁶ Bājī, *Muntaqā*, vol. 6, p. 400.

²²⁷ Ibn Rushd, *Bidāya*, vol. 3, p. 1198.

iii. Uncertainty with Respect to the Remaining Life

The fourth type *gharar* that Ibn Rushd lists in his typology is that of the sound condition (*salām*) and remaining life (*baqā'*) of a good.²²⁸ However, like the previous form of uncertainty, he does not explicitly use it in his analysis of transactions characterized by *gharar*. Nevertheless, one may guess that this type of uncertainty refers to the qualities and quantity of a good and its existence at present and in the future.

In fact, Shīrāzī uses the word *baqā'* several times in his sub-chapter on *gharar* in this way. For example, Shīrāzī cites two opinions regarding the sale of a non-fungible good that is not present at the sale and that may change before its delivery. According to one opinion, this sale is impermissible “because there is doubt about it remaining qualitatively the same (*li-annahū mashkūk fī baqā'ihī 'alā ṣifatihī*).”²²⁹ Later, he discusses whether *gharar* arises from selling things that have a protective coating, shell, or container. Ibn Surayj (d. 306/918) permitted the sale of musk in a container on the grounds that the container preserves the musk to a greater extent (*li-anna baqā'ahu fihā akthar*).²³⁰ However, the school opinion forbids this sale due to uncertainty with respect to the quality and quantity of the musk in the container.²³¹ Sarakhsī also uses the verb

²²⁸ Ibn Rushd, *Bidāya*, vol. 3, p. 1198.

²²⁹ Shīrāzī, *Muhadhdhab*, vol. 3, p. 37.

²³⁰ Abū al-‘Abbās Aḥmad b. ‘Umar b. Surayj was a prominent Shāfi‘ī who was responsible for the institutionalization of the school. For further biographical details, see EI², s.v. Ibn Suraydj.

²³¹ Shīrāzī, *Muhadhdhab*, vol. 3, p. 39.

baqā in a similar sense to argue that one cannot sell a runaway slave on the presumption that the slave will remain the same.²³²

V. Conclusion

In this chapter, I have examined the discursive systems employed to outline conceptual architecture of *gharar*. At various points in this chapter, I have distinguished between two forms of uncertainty: 1) unknown-unknowns and 2) known-unknowns. For the most part, this chapter focused on analyzing the forms of knowledge that jurists employ to define the forms of uncertainty—the known-unknowns—associated with *gharar*. These forms of knowledge—such as description, mensuration, and ability to deliver a good—are discursively anterior to their configuration and deployment in the discourse of *gharar*. From uncertainty with respect to the description, the delivery date, and ability to deliver jurists derive and explain the secondary causes of *gharar*. Notwithstanding the fact that each jurist defines the primary forms of uncertainty in slightly different ways, these forms of uncertainty form a discursive regularity that allows for the debates among jurists from different schools of law.

Returning to the unknown-unknowns, knowledge also gives rise to them. In the case of the unknown-unknowns associated with *gharar*, they arise from the bounds that jurists place on discourse. For example, we saw how jurists ignore issues such as the potential death of a counterparty or the complex logistics required for delivering goods.

²³² Sarakhsī, *Mabsūṭ*, vol. 12:4, p.135.

When discourse sets the bounds on what will be thought and how thought will occur it also creates these unknown-unknowns.

Is there a form of uncertainty that knowledge does not create and subsume such that it can stand as a true contrary to certainty? In terms of their discussions of *gharar*, jurists offer no insight into this question. However, returning to the discussions of uncertainty in works of *uṣūl al-fiqh in kalām*, two interesting passages suggest that the answer to this question is no. ‘Alī b. ‘Alī al-Āmidī (d. 631/1233) divides uncertainty into simple and complex, or *basīṭ* and *murakkab* respectively. According to him, simple uncertainty is a total privation of thought with respect to what one should know but does not. This privation has important implications for the representation of *gharar* as we will see in the following chapter. Indeed, this privation is a form of ignorance in Āmidī’s view.

On the other hand, complex uncertainty arises from the mismatch between thought and referent that I examined in the introduction to this chapter. Regardless of the structural difference of both forms of uncertainty, Āmidī defines them both in relation to certainty. Seeing the potential circularity of defining uncertainty in terms of certainty, Āmidī insists that simple uncertainty is essentially contrary to certainty such that they cannot combine. In fact, he claims that an absolute uncertainty (*al-jahl al-muṭlaq*), which would not be defined in relation to certainty, cannot exist since such uncertainty could only apply to inanimate matter devoid of thought and language.²³³ Certainty and uncertainty are traits of human thought, and like most if not all Muslim scholars, Āmidī

²³³ Āmidī, *Abkār*, vol. 1, p. 52. For biographical details, see EI², s.v. al-Āmidī.

agrees that some form of innate certainty grounds the acquisition of all knowledge. Such a claim about innate certainty should draw into question his claim that simple uncertainty and certainty can be essential contraries. Even in the case of simple uncertainty, the lack of knowledge is still defined in relation to the knowledge that someone should or will eventually have.

Second, in the introduction to his *Anwār al-Malakūt*, the Shi‘ī theologian ‘Allāma al-Ḥillī (648/1250-726/1325) notes that some people claim that it is impossible to define certainty.²³⁴ According to this group, whatever is not certainty can only be defined by certainty, but this definition converts uncertainty into certainty such that it is impossible for the counter moment to certainty to remain uncertainty. In effect, nothing can effectively stand outside of certainty and its identitarian mode of representation. This position means that certainty is circular since there is no true contrary to validate it.²³⁵ However, to save representation and thought from this circularity, Ḥillī remarks,

Knowledge is either a relational predicate (*ṣifa*) subsisting in the knower or a concept commensurable with the referent of knowledge. Notwithstanding the difference between these two views and appraisals, this referent of knowledge (*ma‘lūm*) is only known when its concept or predication occurs to the knower. Knowledge of this concept or predication may also be due to a definition or description from what was not known. However, the dependency of the referent on knowledge in the first case is different from the dependency of this concept on the definition of description such that there is no circularity (*tawaqquf al-ma‘lūm ‘alā al-‘ilm fī’l-awwal mughāyir li-tawaqquf bi-tilka al-ṣura ‘alā al-ḥadd wa’l-rasm*).²³⁶

²³⁴ For biographical details, see EI², s.v. al-Ḥillī.

²³⁵ Jamāl al-Dīn Ḥasan b. Yūsif b. Muṭahhar al-Ḥillī, *Anwār al-malakūt fī sharḥ al-yāqūt* (Tehran: Chāpkhānah-i Dānisghāh, 1959), p.12.

²³⁶ Ḥillī, *Anwār*, p. 13.

Although the Arabic of this passage is problematic, Ḥillī argues for two alternative moments in the production of certainty.²³⁷ The first is the acquisition of a concept or a predicate of the referent. Presumably, such acquisition arises from perception or some form of reasoning. The second moment in the acquisition of certainty is a definition or description of the previously unknown referent. According to Ḥillī, these two ways of obtaining certainty are different such that no circularity occurs in the definition of certainty. Again, this position is similar to the claim of Ibn Qudāma that we saw in chapter one that a referent, knowledge of it, and communication of it are not all the same. Although Ibn Qudāma establishes that these three forms of the referent are not the same, they must be commensurable for representation to occur. Likewise, Ḥillī still links language and thought through the concept or predicate that is subordinated to the referent. In the end, Ḥillī's analysis remains within the confines of the notion of certainty achieved through an identity between referent, thought of it, and communication of it.

Although neither Ḥillī nor Āmidī clarifies what is exactly at stake if certainty subsumes uncertainty, the litterateur Abū Ḥayyān al-Tawḥīdī (d. 414/1023) offers some insight into the implications in the introduction to an epistle he wrote in defense of logic.²³⁸ Tawḥīdī remarks that,

Both *a priori* rational knowledge and intuitive knowledge affirm that certainty is superior to uncertainty. Indeed, uncertainty does not have any superiority because anything is superior to

²³⁷ The Arabic should probably read, *tawaqquf al-'ilm 'alā al-ma'lūm*.

²³⁸ For further biographical details about Tawḥīdī, see EI², s.v. Abū Ḥayyān al-Tawḥīdī; Mary St. Germain, "Abū Ḥayyān al-Tawḥīdī," in *Essays in Arabic Literary Biography: 925-1350*. Ed. Terri DeYoung and Mary St. Germain (Wiesbaden: Harrassowitz Verlag, 2011), pp. 348-356. For a discussion of the role of philosophy in *adāb*, see Everett K. Rowson, "Philosopher as *Littérateur*: al-Tawḥīdī and His Predecessors," *Zeitschrift für Geschichte der Arabisch-Islamischen Wissenschaften* 5, (1990): pp. 53-92.

uncertainty. In fact, uncertainty is the complete privation of any form of superiority. Likewise existence is said to be superior to its privation and completeness is superior to defectiveness.²³⁹

This passage outlines a theory of representation, which Tawhīdī claims everyone knows both intuitively and rationally. To be precise, this passage coordinates three sets of contraries: the ontological contraries of existence and its privation or non-existence, the epistemological contraries of certainty and uncertainty, and the teleological categories of completeness and defectiveness. On the one hand, the passage equates existence, certainty, and completeness with virtue. On the other hand, it equates the privation of existence, uncertainty, and defectiveness with inferiority and immorality.

This short yet fecund passage reveals the complex process that ensures the marginalization of uncertainty. This theory strips uncertainty of any merit as an object of study. Indeed, uncertainty is a threat that exists only in its relation to the morally positive counter-moments of existence, certainty, and completion. To study and thereby acknowledge uncertainty would be the basest act that one could engage in according to this charged passage.

If uncertainty were the product of certainty it would collapse the systems of contraries that coordinate representation. In particular, it would undermine the notion of truth and certainty, which arises from objectivity, and error and uncertainty, which arises from subjectivity. Furthermore, if certainty produced uncertainty it would collapse the moral equation that this passage presents. Certainty could not be the virtuous reference

²³⁹ Abū Ḥayyān al-Tawhīdī, *Al-Risāla fī al-'ulūm*, in *Risālatān li'l-'allāma al-shahīr Abī Ḥayyān al-Tawhīdī* (Qusṭanṭīniya: Maṭba'at al-Jawā'ib, 1884), p. 201. *Annahu subīqa fī qaḍāyā al-'uqūl al-ṣaḥīḥa wa-thubīta fī muqaddamāt al-albāb al-ṣarīḥa anna al-'ilm ashraf min al-jahl bal lā sharaf li'l-jahl fa-yakun ghayruhu ashraf minhu li-anna al-jahl 'adam hākadhā. Qīla al-wujūd ashraf min al-'adam wa'l-ṣiḥḥa ashraf min al-saqam.*

point if it were also to give rise uncertainty, a point of extreme immorality. Indeed, the moral problem that arises from knowledge creating uncertainty has well-known parallels in Islamic theology with the problem of how an omnipotent and just God could create evil or allow it to exist.

The uncertainty associated with *gharar* and the uncertainty discussed in work of *uṣūl al-fiqh* and *kalām* are both immoral. The uncertainty associated with *gharar* is even worse since it is illegal unlike simple forms of ignorance or error. Although *gharar* symmetrically affects both counterparties when they enter into a transaction, ultimately one counterparty will benefit at the expense of the other given time. In effect, *gharar* is like a form of gambling— an analogy we will examine in the next chapter. For jurists, gain and loss should follow certainty, albeit certainty defined only in terms of the description, delivery date, and ability to delivery of the good.

There remains another key difference between discussions of uncertainty in Islamic commercial law on the one hand and in *uṣūl al-fiqh* and *kalām*. In the case of *uṣūl al-fiqh* and *kalām*, a representation is incorrect due to an incorrect relationship between thought and the referent. Even more problematically, one who has this form of uncertainty cannot recognize the error, a situation which leads to mistakes. However, in the case of the forms of uncertainty associated with *gharar*, one is conscious of it and thus can make informed decisions. In the following chapters, in order to explain the differences between the forms of uncertainty associated with *gharar* and that adumbrated in *uṣūl al-fiqh* and *kalām*, I examine the relationships between forms of uncertainty and the referents upon which thought labors.

Chapter Three

The Privation of Objects and Thought

In the previous chapter, I examined the forms of uncertainty that engender *gharar* and how jurists employ a variety of forms of knowledge in order to conceptualize and define these forms of uncertainty. In this chapter, I will begin to examine how jurists apply these forms of uncertainty to analyze and discuss specific transactions. In order to pursue this analysis, this chapter will examine two interconnected issues. The first issue is to understand the systems of knowledge that jurists employ to describe the existence of goods and various aspects of commercial transactions. The second issue is to understand the exact way that jurists employ the forms of uncertainty examined in the previous chapter to describe the legality of commercial transaction. Or to put it differently, one must understand how the forms of uncertainty associated with *gharar* relate to specific referents and transactions. The examination of these two issues reveals how *gharar* enables accurate representations and judgments about commercial transactions.

To begin to analyze the relationship between the forms of uncertainty associated with *gharar* and specific transactions and goods we need return once again to the model of representation common to works of *kalām* and *uṣūl al-fiqh*. According to this model, reality, which must exist in-itself, is the ultimate arbiter of the validity of thought and communication. Whereas, certainty arises from a perfect identity between thought and its referent, uncertainty arises from a mismatch between the two. With this form of uncertainty detailed in works of *kalām* and *uṣūl al-fiqh*, one is unconscious of this incorrect synthesis and thus cannot make an informed decision.

On the other hand, with *gharar*, counterparties are aware when uncertainty affects a transaction, and thus they can make informed decisions about this uncertainty. Such consciousness of uncertainty requires a different relationship between thought and referents than the relationship outlined in works of *uṣūl al-fiqh* and *kalām*. In order to understand *gharar*, in the remaining chapters of this study I will examine the use of the forms of uncertainty with *gharar* to analyze specific transactions. Notwithstanding the variety of transactions and legal views that jurists present, the relationship between the forms of uncertainty and their employment to analyze transactions may be categorized into three types of relationships: 1) privative, 2) analogical, and 3) hermeneutical.

This chapter will focus on the privative relationship since it is the most basic interaction between the forms of uncertainty and the transactions that jurists analyze in commercial transactions. To understand the privation, we first most briefly return to Aristotelian model of representation, which argues for the commensurability of a referent's existence, thought of it, and communication about it. Notwithstanding the commensurability of these three forms of a referent, the existence of the referent in reality is primary whereas thought of and communication about it are secondary. It is reality that determines the objective validity of thought and language. Without such an independent reality populated with self-subsisting referents objective truth would not exist. Ibn Ḥazm sheds light on this point in his *Taqrīb li-ḥadd al-manṭiq* when he remarks that existence has four modes of manifestation (*bayān*), but it "is the first of these modes of manifestation (*bayān*) of the referent, since a non-existent cannot be recognized." In

turn, the non-existent cannot be thought or spoken of, according to Ibn Ḥazm.²⁴⁰ The lack of a referent in reality causes privation of thought and communication about it.

The privation that causes *gharar* is more complex than logically or empirically impossible referents like the round-square or unicorn. The referents that jurists analyze in their discussions of *gharar* must be able to exist so as to permit the formation of the identity that engenders certainty. In the case where the specific referent does not exist this causes the privation of thought about it that engenders uncertainty. The privation is thus not a complete lack. Rather, it exists only in relation to the possibility of the correct identity between the referent and thought that is required to obtain certainty with respect to a specific transaction. Uncertainty thus can only exist as a by-product of certainty in the case of *gharar*.

²⁴⁰ Ibn Ḥazm, *Taqrīb*, pp. 10-12. The use of term *bayān* in theories of representation has a rich and complex history that pre-dates Ibn Ḥazm's use of the term. Interestingly, the earliest technical use of the term appears to be in the *Risāla* of Shāfi'ī who uses the term to detail the ways that the *Qur'an*, *sunna*, and *ijtihād* interact to represent the Law. For the most systematic presentation of his theory of *bayān* in the *Risāla*, see Muḥammad Idrīs al-Shāfi'ī, *Risāla*, in *al-Umm*, Rif'at Fawzī 'Abd al-Muṭṭalib, 11 vols. (Manṣūra, Dār al-Wafā li'l-Tiba'a wa'l-Nashr, 2005), vol. 1, pp. 7-22. According to Lowry, the concept of *bayān* is the core idea that structures the law in Shāfi'ī's view. See, Lowry, *Theory*, pp. 23-59.

Jāhiz appears to be the next scholar to use the term *bayān* to outline a theory of representation, which Montgomery reads as a conscious polemic against Shāfi'ī usage of the term. Jāhiz's theory of representation has five modes: speech, gesticulation, math, writing, and index (*niṣba*). By the last term, index, I mean forms of representation that are not conventional and thus not restricted to human production. Rather, these modes of communication rely on inferences and deduction to create meanings. For example, Jāhiz claims that nature provides many indexes of God's existence and the corpse is an index of the death of the person. Although Jāhiz claims that each of the five modes of representation are different, he also states that the index can replace the other four modes of representation. Index thus grounds all conventional human forms of communication. Montgomery, who reads this passage in the light of Aristotle's *Categories*, translates the term "*niṣba*" as location for the Aristotelian term "*to keisthai*." However, this translation of the term and reading of the Jāhiz's work in the light of the Hellenistic and more specifically Aristotelian tradition does not make sense of the examples that Jāhiz gives and lacks any solid "philological proof" as Montgomery admits. See, Abū Uthmān b. Baḥr al-Jāhiz, *Kitāb al-Bayān wa'l-Tabayīn*, ed. Ibrāhīm Shams al-Dīn, 2 vols. (Beirut: Mu'assasat al-A'lamī al-Maṭbū'āt, 2003), vol. 1, pp. 82-88; Montgomery, *Bayān*, esp. pp. 91-93, 125-133.

It is important to note that the forms of uncertainty associated with *gharar* are more general judgments about a lack of referent in the analysis of a specific transaction. To say that a transaction has uncertainty in terms of the quality does not indicate the exact quality that must be present and known. The forms of uncertainty configure a checklist of the general referents and traits that a valid contract must possess to avoid *gharar*.

To understand how this privation occurs in jurists' discussions of commercial transactions, I will explore the nature of the existence of the referents that jurists discuss in several transactions characterized by *gharar*. Notwithstanding the claims of Ibn Ḥazm and other scholars who support the Aristotelian model of representation, referents do not simply exist as self-subsisting entities, or at least not in commercial law. We saw in chapter one that Ibn Qudāma deconstructs this notion of reality to subordinate it to discursive practices of a community. In a similar fashion, Ibn Ḥazm also deconstructs the objective referents that this Aristotelian model of representation requires.²⁴¹ Rather, discourse structures how we think and represent the referents that populate reality.

In this chapter, I will be exploring the forms of discursive knowledge that jurists employ to imagine and describe the existence and non-existence of a referent. By the phrase "legal existence," I mean that jurists accord a referent a status of existing in the

²⁴¹ To be precise, Ibn Ḥazm declares the universality of thought due to its subordination to reality. However, he remarks a few pages later that Latin employs several different words and concepts, which Arabic lacks, to pose questions. See Ibn Ḥazm, *Taqrīb*, p. 20. However, if thought is truly universal, Latin should not have additional concepts for asking questions. One might try to save Ibn Ḥazm from this aporia by claiming that a referent existing in reality does not lie behind the words and concepts of questions unlike the word and concept for "table," which does have a referent in reality. Unfortunately, this counterargument would only further prove that representation is subordinated to specific discourses rather than some form of a univocal and static reality.

eyes of the law even if the referent may not “physically” exist. Conversely, they may deny the legal existence of a referent even if it “physically” exists at the time that the counterparties enter into the contract. This legal existence is like the concept of constructivism in American law, which accords corporations a legal personality notwithstanding the fact that corporations lack sentience or personality in the same sense as people.²⁴² The legal existence of the referent enables jurists and counterparties to have certainty with respect to the ability to deliver the good of the contract, specify the delivery date, and describe the good. Conversely, the lack of a specific referent leads to privation of representation that causes the forms of uncertainty associated with *gharar*.

In order to elucidate the different forms of discursive knowledge systems that jurists employ to represent the legal existence of the referents of their analyses, I will analyze several important paradigmatic transactions that have *gharar*. Transactions like the *mulāmasa*, *munābadha*, and *bay‘ al-ḥaṣā* are rather clear-cut commercial situations where the counterparties lack the referents required to attain certainty with respect to good of the sale. On the other hand, transactions like the sale of milk in the udder of a cow or the sale of a fetus, are particularly hard cases where jurists examine the referents whose existence is uncertain. Taken together, this chapter and the previous one detail how jurists represent the forms of uncertainty associated with *gharar* so as to create a privation of identity between referents and thought.

²⁴² For further details in American law, see *Black’s Law Dictionary*, 7th ed., s.v. constructive, legal fiction, personality. For a longer discussions of legal personality in Common Law, George Whitecross Paton, *A Text-Book of Jurisprudence* (Melbourne: Clarendon Press, 1946), pp. 249-281.

Finally, pre-modern Muslim scholars discussed the nature of existence at great length in works or *kalām* and philosophy. With the victory of ‘Ash‘arī and Māturīdī theology, most Muslims adopted an occasionalist ontology in which the semblance of causation is merely a form of grace from God to make the world appear rational for humans. To the best of my knowledge, the only explicit parallel with theological occasionalism is Sarakhsi’s fascinating comparison of the existence of the usufruct of goods to the existence of the accidents in atoms as we will see below. More generally, Ibn Ḥazm employs a theological argument to validate his notion of ownership and *gharar*. Nevertheless, theological considerations, such as whether people have free-will or events or predestined, do not overtly inform the discussion of *gharar* in any meaningful sense.

I. Discursive Levels—*Mulāmasa*, *Munābadha*, and *Bay‘ al-ḥaṣā*

Mulāmasa, *munābadha*, and *bay‘ al-ḥaṣā* form a triumvirate of allegedly pre-Islamic sales that jurists generally examine first in their discussions of *gharar*. Unlike other transactions characterized by *gharar*, my jurists present relatively uniform descriptions of and rulings on these three transactions. For jurists, these transactions function, due to the role of contingency, as extreme cases of uncertainty in terms of the description and quantity of the good. More importantly, the relationship between this form of uncertainty and the goods of these transactions creates, from the perspective of jurists, a privation of identity between thought and the description and quantity of the good for both counterparties. However, the unity of legal analysis does not imply the unity of functions of discourse about these transactions. Functionally, the discourses of

jurists fall into two categories: 1) paradigmatic discourses on *gharar*, and 2) comparative discourses.

a. Paradigmatic Discourse

Ibn Rushd presents the most detailed description of the *mulāmasa*, *munābadha*, and *bay' al-ḥaṣā*, which he claims were common pre-Islamic transactions. The *mulāmasa* was the purchase of a robe on the basis of touching it either without unfolding it or in the dark.²⁴³ As for the *munābdaha*, counterparties threw each other goods on the condition that the sale was binding. Finally, with the *bay' al-ḥaṣā*, a person would either throw a stone and get the dress that it landed on, or the sale would become binding if a stone fell from the buyer's hand.²⁴⁴ Most of the other jurists offer similar descriptions of these transactions. However, Ibn Qudāma describes a variation on the *bay' al-ḥaṣā* where the buyer would promise to purchase all of the land that the stone that he threw hit.²⁴⁵

While reading their descriptions, one gets the sense that the jurists employed some folk etymology to explain these terms. If the reports about the shrewdness of the Qurayshī merchants are to be believed, it seems improbable that they employed these methods in their serious business dealings.²⁴⁶ These transactions seem reminiscent of a

²⁴³ Ibn Rushd, *Bidāya*, vol. 3, p. 1200.

²⁴⁴ Ibn Rushd, *Bidāya*, vol. 3, p. 1200.

²⁴⁵ Ibn Qudāma, *Mughnī*, vol. 4, p. 156, ¶ 3059. For other descriptions of these sales, see Bājī, *Muntaqā*, vol. 6, p. 405-406; Shīrāzī, *Muhadhdhab*, vol. 3, pp. 45-46.

²⁴⁶ According to common wisdom, the Meccans were savvy merchants and financiers by the time of the Prophet. They controlled the trade of precious goods flowing from South Arabia to the Byzantine and Sassanian Empires. For these accounts, see Fred Donner, "Mecca's Food Supplies and Muḥammad's Boycott," *Journal of Economic and Social History of the Orient* 20:3

ring toss game at a carnival. Indeed, these transactions seem to be examples of a larger narrative about the recklessness and amorality of people in Pre-Islamic Arabian society. Discursively, the importance of these transactions is not their historicity, but the fact that they serve as cases of maximal and pointless *gharar*. Ibn Rushd concludes his brief paragraph on *bay' al-ḥaṣā* by stating that these transactions are like *qimār*, gambling.²⁴⁷ Bājī, Shīrāzī, and Ibn Qudāma argue that a sale cannot be contingent on a random future event like the tossing of stone (*lā yajūz ta'līq al-bay' 'alā sharṭ al-mustaqbal*).²⁴⁸ According to Ibn Rushd, the *munābdaha* occurs without either counterparty selecting (*yu'ayyin*) the good but rather on the basis of chance (*ittifāq*).²⁴⁹

Due to the role of chance, the good of the sale is unknown at the time the counterparties enter into the contract.²⁵⁰ Both Bājī and Ibn Qudāma state that the buyer purchases a good without any contemplation (*ghayr ta'ammul*).²⁵¹ Ibn Rushd claims that

(1977), pp. 249-250; M.A. Shaban, *Islamic History A.D. 600-750: A New Interpretation* (Cambridge: Cambridge University Press, 1971), pp. 2-9; W. Montgomery Watt, *Muhammad at Mecca* (Oxford: Clarendon Press, 1953), p. 3. In her study, Patricia Crone has drawn into question the portrayal of the Meccans as controlling a long distance trade in high value goods. Although she suggests that the Meccans may have traded common pastoralist and agricultural goods throughout Arabia and on the fringes of settled areas, she argues that the logistics and economics of this trade make do not make sense on the basis of our current understanding of trade networks in Arabia. Patricia Crone, *Meccan Trade and the Rise of Islam* (Princeton: Princeton University Press, 1987), pp. 3-11, 149-167.

²⁴⁷ Ibn Rushd, *Bidāya*, vol. 3, p. 1210.

²⁴⁸ Bājī, *Muntaqā*, vol. 6, p. 405, Ibn Qudāma, *Mughnī*, vol. 4, p. 156, ¶ 3058; Shīrāzī, *Muhadhhab*, vol. 3, p. 45.

²⁴⁹ Ibn Rushd, *Bidāya*, vol. 3, p. 1200.

²⁵⁰ Shīrāzī, *Muhadhhab*, vol. 3, pp. 45-46.

²⁵¹ Bājī, *Muntaqā*, vol. 6, p. 405; Ibn Qudāma, *Mughnī*, vol. 4, p. 156, ¶¶ 3058-3059.

the *munābadha* creates uncertainty with respect to the quality of the good.²⁵² Bājī

elaborates on this comment by stating that,

The buyer cannot examine and know the good's characteristics until he touches it or the seller throws it to him. The buyer thus does not know the description of the good whose price will vary as the description does.²⁵³

Bājī's criticism connects the epistemological dimensions of *gharar* to the ability to value a good. By not specifying the good, the counterparties lack certainty with respect to its description such that it becomes impossible to value the transaction.

Due to the role of chance, either the buyer or both counterparties are uncertain with respect to the quality and quantity of the good. As indicated in the previous chapter, to acquire certainty with respect to the description of the good one must either visually inspect it or receive a description of its relevant traits. True, the buyer in these transactions may have some intuition about the good that he feels in the dark or the object that his stone will hit. However, rather than according any representative value to these ideas or intuitions, jurists simply treat them as uncertainty. In effect, the discourses of these jurists suppress the existence of the objects of these transactions so that a privation of identity occurs, which creates uncertainty with respect to the description of the good of the transaction.

²⁵² Ibn Rushd, *Bidāya*, vol. 3, p. 1200.

²⁵³ Bājī, *Muntaqā*, vol. 6, p. 405. *Lā ya'rif bihi al-mubtā' mā yaḥtāj ilā ma'rifatihi min ṣifāt al-mabī' alladhī yakhtalif thamanuhu bi-ikhtilāfihi wa-yatafāwat*).

b. Comparative Discourse

Unlike the previous jurists, Ibn Ḥazm and Sarakhsī employ these transactions within their conversations about the typologies of licit commercial transactions. Both jurists discuss transactions that initially seem to lack a good, such as a *salam* contract or lease. One might think that these transactions have *gharar* since they lack a good at the time of the contract. These two jurists, however, then compare these seemingly problematic transactions to the *mulāmasa*, *munābadha*, and *bay' al-ḥaṣā* in an effort to refute any analogy between the two sets of transactions. Although the discussions of Ibn Ḥazm and Sarakhsī clearly presume those in the previous section, Ibn Ḥazm and Sarakhsī do not describe *mulāmasa*, *munābadha*, and *bay' al-ḥaṣā*.

According to Ibn Ḥazm, some Shāfi'īs interpret the prohibition on the *mulāmasa*, *munābadha*, and *bay' al-ḥaṣā* to mean that all transactions require a visual inspection. Although Shīrāzī does not corroborate this claim, Ibn Ḥazm attributes a number of arguments to the Shāfi'īs. According to one argument, the sale of what is not present when the contract is negotiated causes *gharar* since the good may be destroyed before the buyer takes possession of it. However, Ibn Ḥazm retorts that if the sale on the basis of a description has *gharar* due to this reason, every sale on the face of the Earth would fall prey to the same concern. Ibn Ḥazm then claims that these Shāfi'īs also compare the sale of a good that is not present at the sale to the *mulāmasa* and *munābadha*. Ibn Ḥazm responds that a sale on the basis of a description bears no resemblance to these prohibited

transactions since God permits the sale of what is not present based on a description and as long as the seller owns the good.²⁵⁴

Implicit in this debate is the question of whether a valid analogy exists between a sale based on a description and the *mulāmasa* and *munābadha*. On the one hand, according to Ibn Ḥazm, these Shāfi‘īs argue that with the *mulāmasa* and *munābadha* the buyer cannot inspect the good of the transaction in order to gain certainty and thus any transaction without a visual inspection is uncertain. For this group, even with fungible goods, language is not equivalent to knowledge acquired by a visual inspection. On the other hand, Ibn Ḥazm denies the validity of this analogy and lays out the two-tier typology of licit sales: 1) a good that is present at the transaction and can be inspected (*sil‘a ḥāḍira mar’īya muqallab*), and 2) a good that is not present, but can be accurately described with reference to a good similar to it (*sil‘a ghā’iba ma‘rūfa aw mawṣufa bi-mithlihā*).²⁵⁵ Ultimately, a verbal description engenders certainty with respect to fungible goods since the description stands in for the actual object according to Ibn Ḥazm and the other jurists examined in this study. On the other hand, the *mulāmasa* and *munābadha* effectively lack a good that one can examine or describe due to the role of contingency in these transactions.

Sarakhsī mentions the prohibition against *mulāmasa* and *munābadha* in the beginning of his chapter about contracts of lease and hire. For Sarakhsī, a lease or hire poses a conceptual problem of defining and valuing the usufruct of the good or service.

²⁵⁴ Ibn Ḥazm, *Muḥallā*, vol, 8, pp. 339-341, ¶ 1411.

²⁵⁵ Ibn Ḥazm, *Muḥallā*, vol. 8, p. 336, ¶ 1411.

Usufruct does not tangibly exist like land, grain, or a person. In fact, Sarakhsī compares usufruct to the accidents of substances. These accidents phase in and out of existence unpredictably.²⁵⁶ This comparison between usufruct and metaphysical attributes should imply the impossibility of defining and valuing a lease or hire.

However, Sarakhsī argues that a host of legal mechanisms create an epistemic space so that uncertainty with respect to the quantity and description of a good does not occur, unlike in the case of the *mulāmasa* and *munābadha*.²⁵⁷ In particular, the contract and good or labor stand in for the usufruct as the relevant referents for the analysis of whether *gharar* affects a particular transaction. As with the other jurists, for Sarakhsī, the *mulāmasa* and *munābadha* lack any referents or any method to ameliorate this lack, and so there is uncertainty with respect to these transactions.

II. Sales of Milk

According to jurists, the *mulāmasa*, *munābadha*, and *bay‘ al-ḥaṣā*, lack a specific good, a lack which leads to uncertainty notwithstanding the fact that the counterparties may have some vague conception of the good. Although jurists may have the luxury to prohibit the *mulāmasa*, *munābadha*, and *bay‘ al-ḥaṣā* due to the role of chance, others transactions like the sale of milk in the udder and the sale of fruit present uncertainty due to the structure of the referents of legal analysis. In both cases, jurists employ a variety of epistemic systems to delineate a referent’s existence. I will first examine the sale of milk

²⁵⁶ For his comparison of usufruct and utility of goods with accidents within substances, see Sarakhsī, *Mabsūṭ*, vol. 11:4, pp. 79-80; vol. 15:5, pp. 126.

²⁵⁷ Sarakhsī, *Mabsūṭ*, vol. 15:5, p. 76.

in the udder, for which jurists develop a range of interesting yet legally contradictory opinions due to different epistemic systems employed to represent the contents of the udder.

a. Individuality

The majority of jurists describe this transaction as the sale of the milk in the udder of an individual animal. This individuality, however, presents maximal uncertainty.

According to Sarakhsī,

Gharar is what has an unforeseeable outcome (*mastūr al-‘āqiba*). It is unknown (*lā yudrā*) whether air, blood, or milk is in the udder. A sale is restricted to property with monetary value (*al-bay‘ yakhtaṣṣ bi-‘ayn māl mutaqaawwim*). However, the milk is like a quality inside the animal (*bi-manzilat al-ṣifa fī l-ḥayawān*) and the milk in the udder lacks monetary value by itself before it is milked. The interior qualities of an animal do not permit a sale as with a hand or a foot because the milk increases moment after moment and the sale neglects this increase. The mixing of the sold milk with milk produced after the sale that belongs to the animal’s owner makes distinguishing the sold milk from the unsold milk impossible (*yata‘adhdhar tamyīzuhu*), which invalidates the sale. Thus a legal dispute may occur between the counterparties with respect to the delivery because the buyer will relentlessly claim that he is owed more milk, but the seller will reject these demands²⁵⁸

In this quotation, *gharar* coordinates the use of several forms of uncertainty and modes of analysis. The milk in the udder presents uncertainty in terms of the exact quantity and quality that is being purchased. Sarakhsī even doubts the very existence of milk in udders in order imply that the transaction lacks a referent. Even if the udder has milk, this creates more uncertainty since the sold milk cannot be distinguished from the milk that the

²⁵⁸ Sarakhsī, *Mabsūt*, vol. 12:4, pp. 194-195.

animal produced after the sale and thus belongs to its owner. The uncertainty with respect to the quantity and quality of the milk also causes uncertainty with respect to its delivery. Taken together, Sarakhsī argues that this transaction lacks a referent that would enable the representation of its legal and economic value.

Ibn Ḥazm prohibits this sale for similar reasons when he states that,

The proof of the invalidity of a sale of what is not known either by visual inspection or a sound description is the prohibition of the Prophet against sales with *gharar* and this transaction epitomizes *gharar* since the good of the sale is unknown (*lā yudrā*).²⁵⁹

He then adds another, novel, reason for prohibiting this sale that compounds the uncertainty. If the milk has not been extracted, one of the counterparties must take the time and labor to milk the animal. However, just as the quantity of milk cannot be quantified beforehand, neither can the labor required to extract it be defined so that the price of the milk is unknown.²⁶⁰ Shīrāzī and Ibn Qudāma offer reasons similar to those of Ibn Ḥazm and Sarakhsī.²⁶¹

b. Generality

As compelling as these arguments may be, they rest on several assumptions and reasoning techniques to define the referent of these transactions and thus *gharar*. In particular, these jurists grant no role to expert knowledge and probability. Considering

²⁵⁹ Ibn Ḥazm, *Muḥallā*, vol, 8, p. 343, ¶ 1413.

²⁶⁰ Ibn Ḥazm, *Muḥallā*, vol, 8, p. 343, ¶ 1413.

²⁶¹ Ibn Qudāma, *Mughnī*, vol. 4, p. 157, ¶¶ 3061-3062; Shīrāzī, *Muhadhdhab*, vol. 3, p. 43.

the fact that a cow must be milked twice a day in order for its udders to not become infected, it seems that the counterparties would or at least could know the likely quantity and quality of milk to be produced. Furthermore, in the previous chapter, I noted that jurists argue that valuation relies on the construction of general classes of goods that allow for comparisons on the basis of a resemblance. Surely, it must be possible to do the same in this case.

In fact, Bājī and Ibn Rushd introduce a subtle yet significant change into their analyses of this transaction to provide a referent. Rather than discussing the sale of milk from an individual animal, they discuss that of a herd. According to Ibn Rushd, one may sell in advance, for a defined number of days, the milk of specific animals (*ghanam mu'ayyana*) if the quantity and quality of their milk is generally known (*mā yuḥlab minhā ma'rūfan fī'l-āda*).²⁶²

Bājī adds that one may buy the milk of a specific herd of animals by one of two means. First, the buyer must stipulate a particular quantity to take each day. This mode must fulfill the following three stipulations:

- 1.) He must promptly take the milk,
- 2.) He must mention how much he will take each day and pick a length of time during which these animals will likely keep producing,
- 3.) He must stipulate a quantity of milk that the likes of these animals will most likely produce.²⁶³

With the second method, the buyer contracts to take all of the milk that the herd produces. The duration of the contract cannot exceed the time that the herd is likely to

²⁶² Ibn Rushd, *Bidāya*, vol. 3, p. 1215.

²⁶³ Bājī, *Muntaqā*, vol. 6, p. 208.

produce milk of the specified quality and quantity. Bājī goes on to state that the sale of milk in the udder is licit because it is not really a sale but a lease (*ijāra*) of the udder. Like any lease, this contract requires a specific duration. So the counterparties must assess the traits of the herd in order to define a quantity that is likely to be produced.²⁶⁴

Unlike the other jurists, Bājī argues that one can have certainty with respect to the quantity and quality of the milk of the herd. According to Aṣḥab, whom Bājī cites, “The *gharar* in one specific animal and a number of animals are of the same type but *gharar* is greater in the case of one animal.”²⁶⁵ In other words, the uncertainty that occurs in the sale of the milk of one animal and that of the herd are the same qualitatively but not quantitatively. With one specific animal changes may affect its milk production so that the level of *gharar* can vary widely. However, with multiple animals “some of them will pick up the slack of others so that no increase or decrease will appear in total and this decreases the amount of *gharar*.”²⁶⁶

Ultimately, Ibn Rushd and Bājī use probability to tame the uncertainty that the other jurists argue resides at the center of this transaction. The different views reflect the difference between specificity and generality. For all of the jurists, the past production of a specific animal does not provide insight into its future production. However, generality rather than specificity enables Bājī to circumscribe a set of referents— a herd of cows— whose past production provides certainty about the future milk production. Certainty

²⁶⁴ Bājī, *Muntaqā*, vol. 6, p. 208.

²⁶⁵ Bājī, *Muntaqā*, vol. 6, p. 209. *Al-gharar fiha wa-fi'l-‘adad sawā’ wa-huwa fi'l-wahida athqal.*

²⁶⁶ Bājī, *Muntaqā*, vol. 6, p. 209. *Al-ghanam al-kathira yahsul ba‘duhā ba‘dan fa-lā yazhar fi'l-jumlatihā taghayyur bi-ziyāda wa-lā nuqṣan fa-yab‘ud al-gharar fihā.*

about the future production of the herd provides certainty into quantity and quality of the milk and the ability to deliver this future milk.

Unfortunately, the other jurists do not discuss the sale of milk from a herd. I am inclined to think that this silence reflects a conscious decision on the parts of these jurists. Although the use of probability to delineate a referent for this transaction is interesting, as I mentioned before, anyone who has milked a cow before would know this. In this study, we have and will continue to see that the Bājī and Ibn Rushd generally take the most permissive view toward the use of induction and probability to define certainty. However, what is surprising is the fact that Sarakhsī, a Ḥanafī, is often the most averse to probability and induction, which challenges the general narrative that Ḥanafīs are the most lenient school due to their acceptance of use of analogy to derive laws.

III. Peels, Shells, and Containers

In the previous transaction, notwithstanding the fact that the udder prevents the inspection of the milk one can always buy a bucket of milk in the market where it can be inspected. Many goods, however, like fruits, vegetables, eggs, and nuts have protective coatings that one cannot break without the interior quickly spoiling. Only Shīrāzī, Ibn Qudāma, and Ibn Ḥazm substantively discuss this type of goods. Their analyses of these goods can be divided in terms of whether jurists focus on discussing the physical properties of a good, and analyses that construct the buyer and his subjective goals. Although terms like objectivity and subjectivity are not fixed reference points in either discussions of *gharar* or the theoretical discourses of *uṣūl al-fiqh* and *kalām*, these two terms offer a convenient matrix to understand the legal analyses of these transactions.

a. Objectivity

An egg has a particular set of physical traits that jurists must acknowledge.

However, the ways that jurists describe these traits open different avenues for epistemological and legal considerations. On the one hand, Ibn Ḥazm takes a maximally permissive view of this type of sale by conceiving of goods as undifferentiated wholes. On the other hand, Ibn Qudāma and Shīrāzī have a more nuanced analysis of the traits of the goods and how these traits relate to the buyer's intended uses of these goods.

Although Ibn Ḥazm discusses the problem of the sale of goods whose interiors cannot be examined by referring to many such goods—like nuts, coconuts, honey in beeswax, meat of unskinned sheep, olive oil in olives, an animal along with the sale of the milk in its udders, and eggs—his legal analysis is homogeneous. According to him, the sale of these goods is permissible since God created them and everything else too with depth, length and width. In other words, everything has an interior that may be partially unexaminable. He then cites part of Q 2:275, “God made trade permissible,” and claims that the *sunna* and *ijmā'* permit the sale of grapes and dates with their pits, eggs, and the oil in olives and sesame seeds. He then asks,

What is the difference between these goods that jurists agree about the legality of their sales and those goods, like musk in the gland and honey in beeswax, that jurists disagree about the legality of their sales? There is no way to distinguish them on the basis of the Qur'ān, *sunna*, a defective tradition (*riwāya saqīma*), opinion of the Companions, opinion of the Successors, *qiyās*, a conceptual reason, or *ra'y*. God permitted all of these transactions and did not restrict anything since He said, “So He has distinguished for you what He has prohibited for you.”²⁶⁷ So

²⁶⁷ Q: 6. 119.

if these transactions were impermissible He would have distinguished them for us, but since He did not, their legality is textually stipulated (*manṣūṣ*).²⁶⁸

His argument has two parts. First, all jurists permit the sale of grapes, olives, and dates notwithstanding the fact that these goods have interiors that cannot be examined. However, if someone claims that this form of uncertainty creates *gharar*, he responds that, “The truth is that there is no *gharar*, because each good is an undifferentiated body (*jism wāḥid*), which God created as it is and all that is within it is a portion of all of it.”²⁶⁹ Although fruit has an interior and exterior, he conceives of it as a whole for the sake of his analysis of *gharar* and value. The second part of his argument hinges on the Qur’ānic verse, which he interprets to mean that God must define all of His prohibitions and that things are presumed to be licit unless God states otherwise.²⁷⁰

His argument clearly analogizes the goods he is analyzing to those that have a consensus on the legality of their sale. The legal analogy hinges upon the resemblance between the three-dimensional structures of both sets of goods. Undoubtedly, Ibn Ḥazm would deny that he engaged in analogical reasoning here. Rather he might claim that the unrestricted meaning of the verse embraces all such goods and thereby this meaning

²⁶⁸ Ibn Ḥazm, *Muḥallā*, vol, 8, p. 392, ¶ 1422.

²⁶⁹ Ibn Ḥazm, *Muḥallā*, vol, 8, p. 392, ¶ 1422. *Ammā al-ḥaqq fa-innahu laysa ghararan li-annahu jism wāḥid khalaqhu Allāh ‘azza wa-jalla ka-mā huwa wa-kull mā dākhiluhu ba‘ḍ li’l-jumlatihi.*

²⁷⁰ In works of *uṣūl al-fiqh* and *kalām*, authors generally present complex discussions about whether God must provide evidence for each law and the default status of acts before and after Revelation. For the most in-depth study of these conversations among formative and post-formative jurists, see A. Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (Albany, N.Y.: State University of New York Press, 1995).

supports his argument. Nevertheless, as crafted, his argument explicitly draws attention to the resemblance between the goods to justify their similar legal statuses.

Ibn Ḥazm then lambasts the Shāfi‘ī position that the sale of a coconut with both its outer and inner shells has excessive *gharar*, but if one removes the outer shell the transaction is licit. Although Ibn Ḥazm claims in his polemic that this is the majority opinion among the Shāfi‘īs, Shīrāzī states that it is a minority opinion. Regardless of this fact, Ibn Ḥazm argues that, “With respect to something that is concealed, there is no distinction in the knowledge of the quality (*al-ma‘rifa bi-ṣifa*) of what is underneath the peel whether it has one, two, or more peels.”²⁷¹ In other words, whether a good has one skin or more is irrelevant since the center still cannot be examined. He then points out the fact that the Shāfi‘īs also contradict themselves since they allow the sale of an egg, which has a shell and membrane.²⁷²

Ultimately, Ibn Ḥazm argues that these objects are undifferentiated wholes for purposes of legal analysis. This argument suppresses the physical interiorities whose representations are impossible. When these objects are conceived of as undifferentiated wholes, inspections or verbal descriptions of the exterior become a sufficient basis for knowledge and representations of the entirety of these goods for Ibn Ḥazm.

²⁷¹ Ibn Ḥazm, *Muḥallā*, vol, 8, pp. 392-393, ¶ 1422.

²⁷² Ibn Ḥazm, *Muḥallā*, vol, 8, p. 393, ¶ 1422.

b. Objectivity and Subjectivity

According to Shīrāzī, the Shāfi‘īs disagree about the sales of these types of goods. Unlike Ibn Ḥazm, who argues that fruits and vegetables are undifferentiated wholes for the analysis of *gharar*, the Shāfi‘īs differentiate these goods. For example, in the *Umm*, Shāfi‘ī prohibits the sales of fava beans in the pod since the pod may either be empty, or if there are seeds there is uncertainty with respect to their quantity and quality. The same goes for grain in the husk.²⁷³ The inability to examine the interior of such goods draws into question their very existence and thus the ability to represent them. For this position, value and knowledge are more than skin deep.

In order to permit these transactions, Shāfi‘ī jurists conceive of the physical structure of these goods differently and rely on notions of the subjective values of the buyer. In terms of the physical structure, jurists argue that the coat preserves the interior of the good such as in the case of deer musk in the gland (*nāfiġa*) of the deer or the inner shell of a coconut.²⁷⁴ In this case, jurists essentially treat the good as an undifferentiated whole as Ibn Ḥazm does. For goods whose exteriors are not so beneficial, jurists rely upon the buyer’s uses of the goods to determine the traits to be represented. For example, Shīrāzī forbids the sale of a spadix, which has a cover around it, since the interior, the intended part of the transaction from his perspective, cannot be inspected and he claims that the cover has no use. He also cites Abū Hurayra who permits the sale since one may intend to use the cover as fodder such that there is a referent to represent. In general, Ibn

²⁷³ Shīrāzī, *Muhadhdhab*, vol. 3, p. 38-39.

²⁷⁴ Shīrāzī, *Muhadhdhab*, vol. 3, p. 38-39.

Qudāma's discussion follows a similar pattern of modulating the objectivity and subjectivity of discourse.²⁷⁵

IV. Sale of a Runaway Slave

With the sale of a runaway slave, jurists once again offer a range of views on the legality of the transaction that revolve around the notions of value, knowledge, and ownership rights. However, in this case, the different positions of jurists relate to the epistemic systems that they employ to delineate the object of the transaction. Whereas most jurists analyze this transaction in terms of the ability to deliver the slave, Ibn Ḥazm invokes theology to analyze this transaction.

a. Delivery and Knowledge

For most jurists, the analysis of this transaction hinges on the ability to deliver the slave and how uncertainty about the ability to deliver the slave affects the owner's right to dispose of the slave. Ibn Qudāma puts the problem most concisely when he prohibits the sale of a runaway slave or animal whether the seller knows the location or not (*sawā' 'alima makānahu aw jahilahu*) due to the inability of the seller to guarantee the delivery of the slave or animal.²⁷⁶ Bājī adds that the slave must be described and in the possession of the seller. Although one may sell fungible goods without owning them as we saw in the previous chapter, with a runaway slave *gharar* arises from the fact that the seller can

²⁷⁵ Ibn Qudāma, *Mughnī*, vol. 4, p. 71, ¶. 2902.

²⁷⁶ Ibn Qudāma, *Mughnī*, vol. 4, pp. 150-151, ¶. 3048.

guarantee neither delivery of the specified slave nor a perfect substitute.²⁷⁷ Elsewhere, Bājī states that with this sale, “there is fear about the impossibility of taking possession of it since the buyer can only acquire liability for it by taking possession of it.”²⁷⁸

Sarakhsī adds to these explanations,

With a runaway, ownership of the slave is still affirmed but running away prevents the owner from delivering the slave. Due to this, the sale is impermissible since it is only permissible to sell what the seller can deliver. The seller’s ability to deliver the slave is non-existent due to the slave having run away (*qudratuhu ‘alā al-taslīm tan‘adim bi’l-ibāq*). This sale contains *gharar* because neither the slave’s continued survival in this condition nor his return are certain in reality (*lā yu‘lam baqā’uhu fī al-ḥāl haqīqatan wa-lā ‘awd*).²⁷⁹

Sarakhsī argues in this passage that the status of the slave raises uncertainty about the ability to deliver it. He then goes even further to deprive the slave of the legal status of existence when he states that, “The monetary value of a runaway slave is in the grave, which is to say that it is as though the slave is non-existent in reality (*al-mālīya fī’l-ābiq thāwiya fa-huwa ka’l-ma’dūm haqīqatan*).”²⁸⁰ In general, Sarakhsī and these jurists argue that since the slave is not under its owner’s control the slave’s existence cannot be assured. True, the owner may be able to describe the slave perfectly, but uncertainty about the slave’s whereabouts and existence make this description worthless for jurists. They thus deprive the slave of legal existence with respect to the owner’s ability to sell the slave.

²⁷⁷ Bājī, *Muntaqā*, vol. 6, p. 284.

²⁷⁸ Bājī, *Muntaqā*, vol. 6, p. 399.

²⁷⁹ Sarakhsī, *Mabsūṭ*, vol. 11:4, p. 22.

²⁸⁰ Sarakhsī, *Mabsūṭ*, vol. 13:5, p. 10.

This privation is not complete for all jurists since Ibn Rushd and Shīrāzī permit this sale if the owner knows the location of the slave at the time of the contract.²⁸¹ However, the seller cannot take the payment until the buyer gets the slave. If the seller were paid up-front, this payment would vacillate between being a payment for the sale or an interest-free loan if the sale were later cancelled due to the inability to deliver the slave. Ibn Rushd concludes that the buyer does not pay when a non-fungible object is not present and securely possessed (*bay' al-ghā'ib ghayr al-mā'mūn*).²⁸² Nevertheless, Sarakhsī permits the owner to manumit such a slave or give the slave to a family member.²⁸³ These jurists thus do not totally deprive the owner of all of his rights of disposition over the slave.

b. Fate and Ownership

Ibn Ḥazm has the most lenient position notwithstanding the fact that the Zāhirīs forbid uncertainty in law, or at least in the hermeneutic construction of law. He permits the sale of a runaway slave or animal whether the seller knows the slave's current location or not. To an interlocutor who prohibits the sale since "neither the owner nor anyone else may recognize it," Ibn Ḥazm responds, "Why is it obligatory in your view that a Muslim should lose ownership of his property due to his uncertainty with respect to it?"²⁸⁴ According to him, if uncertainty about its location invalidates someone's

²⁸¹ Shīrāzī, *Muhadhdhab*, vol. 3, pp. 33-34.

²⁸² Ibn Rushd, *Bidāya*, vol. 3, p. 1215.

²⁸³ Sarakhsī, *Mabsūṭ*, vol. 11:4, p. 22.

²⁸⁴ Ibn Ḥazm, *Muḥallā*, vol. 8, pp. 388-389, ¶ 1431.

ownership, it would be impossible to own a piece land without natural or artificial borders to identify and constantly affirm one's ownership of it.

For Ibn Ḥazm, the central problem is to preserve the rights of an owner to dispose of his property by sale. To solve this problem, Ibn Ḥazm claims that God is the ultimate registrar for all property. Even if a person loses his property, God affirms his rights over it until the end of time. Thus, the sale of runaway slave is binding as long as the seller does not prevent the buyer from taking possession of it.²⁸⁵ Ibn Ḥazm adduces a number of textual sources to refute counterarguments.²⁸⁶ The following quotation is his most interesting argument:

This sale does not have *gharar* since it is the sale of something whose seller's ownership is legally affirmed and the slave has a certain description and quantity... If this had *gharar*, the sale of an animal whether present or not at the sale would be illicit since its buyer does not know (*lā yadrī*) whether it will live or die after he buys it. He also does not know whether the animal is healthy or sick and if it is sick whether this sickness is temporary so that the animal will recover, or whether this is terminal so that the animal will perish. *Gharar* is not taken into account prospectively since destiny occurs according to what is unknown and impossible to defend against because it is invisible. God, may He be exalted, said, "No one knows what is hidden in the heavens or Earth except God..." *Gharar* is what is contracted with uncertainty in terms of the quantity or quality in the contract. If they say, "Perhaps the slave died or his description changed at the time of the contract," we respond, "The slave is presumed to be alive and sound such that he is deemed safe from death and his description is presumed to be known with certainty such that he is deemed safe from any change (*wa- 'alā mā tayaqqan min šifātihi ḥattā yašihḥ taghyiruhu*). If his death or change is confirmed the agreement is invalidated."²⁸⁷

²⁸⁵ Ibn Ḥazm, *Muḥallā*, vol, 8, p. 389, ¶ 1431.

²⁸⁶ Ibn Ḥazm, *Muḥallā*, vol, 8, pp. 390-391, ¶ 1432.

²⁸⁷ Ibn Ḥazm, *Muḥallā*, vol, 8, pp. 389-390, ¶ 1431.

In this passage, Ibn Ḥazm recognizes that *gharar* arises from uncertainty, but he limits the forms of uncertainty that cause *gharar* to that of the description of the good. Just as importantly, he limits the effects of temporal causality through two techniques in order to claim certainty with respect to this transaction. First, he argues for the absolute indeterminacy of future events by invoking destiny (*qadar*). But rather than give into a notion of a future without any causality, Ibn Ḥazm adopts the pragmatic view that the description has not changed. Thus, after initially undermining any form of causality that would link certainty from the past and present to that of the future, he reaffirms the role of causality.

The question naturally arises whether Ibn Ḥazm would be so cavalier about the sale of slave who has been missing for ten years. However, he does not address this question since he includes an option in this sale so that sale is invalidated if the slave is not as described in the contract. The option allows Ibn Ḥazm to avoid any complex analysis of the future and to posit a slave that exists as previously observed. Ultimately, Ibn Ḥazm ensures the legal existence of the slave through his arguments about destiny and ownership rights. The other jurists argue that the slave has no legal existence, which causes uncertainty with respect to its delivery.

V. Offspring and Breeding Contracts

In the previous chapter, we saw that *gharar* arises due to three forms of uncertainty: the delivery date, ability to deliver the good of the contract, and the description of the good. However, these forms of uncertainty often combine, such as in

discussions of the following three sales; *bay' ḥabal al-ḥabala*, *bay' al-maḍāmīn*, and *bay' al-malāqīh*.²⁸⁸ Like *mulāmasa*, *munābadha*, and *bay' al-ḥaṣā* contracts, jurists rely on folk etymology to detail these three supposedly Pre-Islamic contracts. According to Ibn Rushd, *bay' ḥabal al-ḥabala*, which means the sale of the offspring of the offspring, refers either to the sale of the second offspring that the same animal or slave will give birth to, or the sale of the third generation of the lineage of an animal or slave.²⁸⁹ Ibn Rushd states that the *bay' al-malāqīh* refers to the sale of sperm and copulation rights with a male (*mā fī zuhūr al-fuḥūl*) and the *bay' al-maḍāmīn* refers to contents of the womb of the female (*mā fī buṭūn al-ḥawāmil*).²⁹⁰ On the other hand, both Bājī and Ibn Qudāma argue that the *maḍāmīn* sale pertains to the male and the *malāqīh* sale pertains to the female.²⁹¹ Sarakhsī admits his uncertainty about the gender of each contract.²⁹² Nevertheless, Ibn Qudāma states that with the *maḍāmīn* sale the purchaser would get all of the offspring that the male sired during a specified period of time that may run for

²⁸⁸ To the best of my knowledge, Ibn Ḥazm does not address these transactions.

²⁸⁹ Ibn Rushd, *Bidāya*, vol. 3, p. 1200.

²⁹⁰ Ibn Rushd, *Bidāya*, vol. 3, p. 1200. Interestingly, Jāhiz uses the word *talāqaḥa* in his *Kitāb al-Ḥayawān* to refer to inter-species mating. He discusses the hybrid offspring of humans and angels along with various ways to create hybrid dogs. However, Jāhiz notes that the possibility and results of these unions can be unpredictable in both the short-term and long-term. In fact, in his study of camels, Richard Bulliet notes that successive generations of hybrids often become economically useless if mated with other hybrids. It is tempting to speculate that historically this prohibition referred to creating hybrids, but later jurists extended it to cover all types of mating. Abū Uthmān b. Baḥr al-Jāhiz, *Kitāb al-Ḥayawān*, 7 vols. (Cairo: Maktabat Muṣṭafā al-Bābi al-Ḥalabī, 1938), vol. 1, pp.156,184-185, 188-189; Richard Bulliet, *The Camel and the Wheel* (Cambridge, Mass.: Harvard University Press, 1975), pp. 142-146. For other early uses of this root, see *Worterbuch der Klassischen Arabischen Sprache*, s.v. *l-q-ḥ*.

²⁹¹ Bājī, *Muntaqā*, vol. 6, p. 359.

²⁹² Sarakhsī, *Mabsūṭ*, vol. 12:4, p. 195.

several years.²⁹³ Regardless of this confusion about the meaning of each term, all of the jurist agree that with any one of these transactions one attempted to purchase the unborn offspring of an animal through these contracts.

Turning to the analyses of the jurists, Ibn Qudāma denudes the fetus of existence by using an *a minora ad maius* argument to prohibit the *ḥabal al-ḥabala* sale. First, he prohibits the sale of a fetus in general since there is uncertainty in terms of the description of the fetus. The buyer does not know if the fetus is alive and even if it is alive, the seller cannot ensure the delivery of offspring. Finally, the delivery date cannot be specified with sufficient accuracy. Due to these reasons, he claims that the sale of the fetus is the sale of what does not exist (*al-ma'dūm*). Since from Ibn Qudāma's perspective the fetus does not exist, one cannot represent its description, delivery date, or ability to deliver it. He then reasons that if one cannot sell a fetus due to these reasons then this prohibition is even stronger for the sale of unborn offspring of the unborn offspring.²⁹⁴

Sarakhsī's reasoning also denudes the fetus of any legal existence. According to him, as with the sale of milk in the udder, the seller, due to uncertainty, cannot ensure delivery of the good. This uncertainty is correlated with the fact that the fetus has no monetary value (*al-in'idām al-mālīya wa'l-taqawwum*). He then analogizes this to the sale of wool on the back of sheep. In both cases, the wool and offspring have no value until separated from the sheep and womb of the mother respectively. This physical separation gives the wool and child a legal existence that engenders certainty with respect

²⁹³ Ibn Qudāma, *Mughnī*, vol. 4, p. 157, ¶. 3061

²⁹⁴ Ibn Qudāma, *Mughnī*, vol. 4, p. 157, ¶. 3061.

to their descriptions and delivery. Without the ability to analyze the child on its own or wool shorn from the sheep, a legal dispute may arise between counterparties according to Sarakhsī.²⁹⁵

Finally, Shīrāzī also prohibits the sale of a fetus in general since the animal may be pregnant or it may be merely bloated. Even if the animal is pregnant the ability to deliver its offspring and the description of the offspring are uncertain.²⁹⁶ He then discusses whether one may sell an animal on the condition that it is pregnant. His school has two views on this issue. The first prohibits this sale since the existence of the fetus is uncertain, and if it does exist its description is uncertain. On the other hand, the second view permits this stipulation since the existence of the fetus is manifest (*zāhir*). As for any remaining uncertainty affecting the existence and quality of the offspring, he states that, “The uncertainty has no legal effect since inspecting it is possible and this effaces any uncertainty.”²⁹⁷ Like the sale of a house where one cannot inspect its foundation, one must rely on the inspection of the rest of the house to determine the state of the foundation.²⁹⁸ In other words, one may obtain certainty based on inferences from certain physical traits. These inferences then serve as referents for obtaining certainty with respect to the delivery and description of the offspring. Unfortunately, Shīrāzī does not indicate which opinion he favors.

²⁹⁵ Sarakhsī, *Mabsūt*, vol. 12:4, p. 195.

²⁹⁶ Shīrāzī, *Muhadhdhab*, vol. 3, p. 42.

²⁹⁷ Shīrāzī, *Muhadhdhab*, vol. 3, p. 42.

²⁹⁸ Shīrāzī, *Muhadhdhab*, vol. 3, p. 42.

The analyses of Bājī and Ibn Rushd generally follow the patterns of the above jurists. Bājī, however, adds two interesting points.²⁹⁹ First, he prohibits these transactions due to uncertainty in terms of the delivery date since a specific date cannot be defined and a long-dated contract has more *gharar*.³⁰⁰ Second, although Bājī agrees that the *maḍāmīn* sale and *malāqīḥ* sale are illicit due to *gharar*, he permits one to lease of a male camel to mate with a female camel.³⁰¹ According to him,

If one leases a stallion in order to mount his female a few times such that this may occur once or several times close together this is permissible. This is because the stallion is defined and specified (*ma'lūm mu'ayyan*), the number of times that copulation is required is known, so that there is no *gharar* or uncertainty.³⁰²

Once he renames this transaction a hire it becomes licit. With a sale, one guarantees the production of offspring. By changing the form and goal of the contract to that of a hire, Bājī focuses on the issues that he claims that the counterparties can know. In this case, he argues that a specific stallion that will mate a defined number of times serves as a set of analyzable referents.

²⁹⁹ Ibn Rushd, *Bidāya*, vol. 3, p. 1200.

³⁰⁰ Bājī, *Muntaqā*, vol. 6, pp. 358-359.

³⁰¹ Bājī, *Muntaqā*, vol. 6, p. 401.

³⁰² The Arabic reads, *al-faḥl ma'lūm mu'ayyan wa'l-akwām ma'lūma fa-laysa fihā shay' min al-gharar wa-lā al-jahāla*. Bājī, *Muntaqā*, vol. 6, p. 360.

VI. Multiple Contractual Agreements in One

For most of the jurists, the transactions raise *gharar* because the good cannot be examined at the time of the sale and in many cases there are reasons to doubt that the good can be delivered. True, there are ways to conceive of goods, such as the case of food that has protective shell or skin, so that one can claim to have knowledge of the good's description. However, *gharar* can also occur even when one can examine a good and is certain to receive it. For example, jurists prohibit contracting multiples sales in one contract. Generally, jurists use the phrase *bay'atān fī bay'a*, or two sales in one, to describe such a transaction, but Sarakhsī employs the term *ṣafqatān fī ṣafqa*, or two deals in one.³⁰³ Although only Ibn Rushd, Bājī, and Shīrāzī state that these transactions cause *gharar*, the other jurists also prohibit them.

Once again, Ibn Rushd offers the most detailed and systematic presentation of this type of transaction. He identifies three types of such transactions: (1) the sale of two goods for two different prices, (2) the sale of one good at two different prices, (3) the sale of two goods at one price on the condition that one of the two sales is binding. The first type of sale may take one of the two following forms: 'Amr sells a house to Zayd for a stipulated price on the condition that Zayd sells him a slave at a different price, or 'Amr offers to sell either a specific good for a *dīnār* or another good for several *dīnārs*. The second type gives the buyer the option to pay either a lower cash price or a higher credit price after the counterparties agree to the sale. Finally, the third type, the sale of one of two goods quoted at the same price, is rather straightforward. For example, one might

³⁰³ Sarakhsī, *Mabsūṭ*, vol. 12:4, p. 196.

offer to sell one of two dresses at the same price.³⁰⁴ In the second and third types of sales, the seller offers several options, the counterparties agree on the transaction, and after the transaction is completed the buyer exercises one of his options.

Bājī mentions a report in which Ibn Wahb asks his teacher, Ibn al-Qāsim, what the phrase “*bay’atān fī bay’a*” means. Ibn al-Qāsim responds that the phrase refers,

To more than can possibly be explained, but the basis that it is built upon and by which its reprehensibility is well-known is that the counterparties transact in two things such that if one is invalidated the other is invalid and this creates impermissible *gharar*.³⁰⁵

Notwithstanding his teacher’s inability describe all of the transactions that violate this prohibition, Ibn Wahb still managed to formulate some of its general categories. In particular, Ibn Wahb describes the second and third categories described in the typology of Ibn Rushd. Bājī also prohibits transactions of the first type described in the typology of Ibn Rushd. The rest of our jurists discuss only the first and second types of transactions.³⁰⁶ In addition, Ibn Qudāma and Ibn Ḥazm prohibit the sale of a good for *dīnārs* on the condition that, post-sale, the buyer exchanges the *dīnārs* for *dirhāms*.³⁰⁷

³⁰⁴ Ibn Rushd, *Bidāya*, vol. 3, p. 1207.

³⁰⁵ Bājī, *Muntaqā*, vol. 6, p. 394.

³⁰⁶ Sarakhsī, *Mabsūṭ*, vol. 12:4, p. 163; Shīrāzī, *Muhadhdhab*, vol. 3, p. 47.

³⁰⁷ Ibn Ḥazm, *Muḥallā*, vol. 9, pp. 15-16, ¶ 1517; Ibn Qudāma, *Mughnī*, vol. 4, pp. 176-177, ¶¶. 3097-3099

For the jurists, the optionality of the contract creates uncertainty in terms of the good, price, and delivery.³⁰⁸ Considering the fact that seller has quoted the price or good to the buyer it is initially unclear where the uncertainty lies. However, according to Shīrāzī, when one sells a good at a specified price on the condition that the buyer agrees to sell a specific good at a specific price,

This sale is illicit due to stipulation of the joint sales in the contract. If the stipulation is removed the price of the good must be increased in proportion to the removed stipulation but this increase is unknown. Thus, if the price is increased it becomes unknown and this is illicit. When the price or good is unknown the sale is invalid.³⁰⁹

In the case where ‘Amr offers to sell a good to Zayd on the condition that Zayd will sell a good to him, the price of one good is contingent upon that of the other good.

Accordingly, the price of one good might be lower or higher than its market value in order to get the other to be sold. If one of the goods cannot be delivered its payment should be returned. However, since neither good was sold at its market value one party would benefit at the expense of the other if one leg of such a transaction were cancelled. Indeed, it is easy to envision that the counterparty that stands to benefit from the cheaper price might intentionally cancel the other part of the transaction. In this case, the two transactions create uncertainty with respect to the delivery of both legs of the trade.

However, this reasoning does not apply to the other types of sales where the problem is too much certainty. Ibn Rushd, Ibn Ḥazm, and Bājī forbid these transactions

³⁰⁸ Bājī, *Muntaqā*, vol. 6, p. 395; Ibn Rushd, *Bidāya*, vol. 3, pp. 1208-1209; Ibn Qudāma, *Mughnī*, vol. 4, p. 177, ¶. 3098; Sarakhsī, *Mabsūṭ*, vol. 12:4, p. 163; Shīrāzī, *Muhadhdhab*, vol. 3, p. 47.

³⁰⁹ Shīrāzī, *Muhadhdhab*, vol. 3, p. 47.

since they evade the rules on *ribā* when one offers a cash price and higher credit price, or when the counterparties engage in a repurchase sale (*bay' al-īna*).³¹⁰

Finally, Bājī discusses what happens when one offers the buyer the choice of one of two dresses with each dress having the same price. However, unlike the other jurists, Bājī defines the legality of this transaction in terms of the relationship between the two dresses and their values. According to him, if the two dresses are the same type and value this sale is permissible since,

This is not two sales in one because the meaning of two sales in one is that each sale is intended for a specific purpose that occurs when the prices differ, the genus of the goods differ, or the quality of the goods differs such that the price does.³¹¹

In other words, if the seller offers two goods that are of the same type, quality, and value, he has offered two indistinguishable copies of the same good so that there exists no real choice or uncertainty since the buyer's choice is irrelevant in relation to good's qualities. Likewise, if dresses are the same price the contract is valid.³¹²

Ultimately, the analysis of Bājī raises the larger question of how one determines the nature of equality and difference in order to represent and categorize goods. The notion of equality and difference looms large in the process of valuing goods and services. For example, discussions of *ribā* categorize goods so as to determine which goods are the same type and thus must be traded in equal quantities.

³¹⁰ Bājī, *Muntaqā*, vol. 6, p. 394. Ibn Ḥazm, *Muḥallā*, vol. 9, pp. 15-16, ¶ 1517; Ibn Rushd, *Bidāya*, vol. 3, pp. 1208-1209.

³¹¹ Bājī, *Muntaqā*, vol. 6, p. 391.

³¹² Bājī, *Muntaqā*, vol. 6, p. 397, ¶. 1345.

The issue of difference and equality also plays a central role in the analysis of *gharar* as we saw in the previous chapter's discussion of fungible and non-fungible goods. To recall, jurists argue that fungible goods of the same type have a level of sameness that enables objective representations. On the other hand, non-fungible goods lack a sufficient level of similarity that would enable objective representations. Rather, the representations of non-fungible goods reflect the subjective values of counterparties. Nevertheless, goods do not mediate the distinction between fungible and non-fungible. If a good did mediate this distinction non-fungible goods would have an objective representation. In chapter two, we saw that although most jurists permit one to sell a horse on the basis of a verbal description, Sarakhsī does not since he claims that a horse is a non-fungible good whose price depends on the subjective values of a buyer. The fact that jurists debate which goods are fungible and which are non-fungible indicates that the categorization of goods is not inherent to the goods themselves. Rather, the distinction between fungible and non-fungible reflects the discursive practices that jurists employ to analyze and compare goods. The following chapters will examine in more detail the discursive practices that jurists employ to conceive of the existence of goods and represent *gharar*.

VII. Conclusion

In this chapter, I detailed the relationship between the forms of uncertainty associated with *gharar* and the referents that jurists analyze to determine the legality of commercial transactions. Unlike the uncertainty detailed in works of *uṣūl al-fiqh* and *kalām* that arises from a mismatch between thought and the referent, *gharar* arises from a

lack of referent, which in turn leads to a lack of thought with respect to it. This lack of both referent and thought creates the privation of identity that engenders *gharar*.

Throughout this study, I have claimed that certainty subsumes and creates uncertainty such that uncertainty is derivative of and secondary to it. In the previous chapter, I examined the forms of knowledge that jurists employ to define the types of uncertainty that cause *gharar*. Likewise, jurists also employ a number of forms of knowledge to represent and analyze the legal existence of the referents of commercial transactions. In both the cases of the definition of the forms of uncertainty and referents, jurists employ a variety of forms of knowledge to endow *gharar* with an existence.

In a more complex sense, the privation also depends on the correct identity between thought and referent. In the introduction to the previous chapter, I remarked that the forms of uncertainty discussed in the introduction to works of *uṣūl al-fiqh* and *kalām* present a potentially infinite number of incorrect combinations of thoughts and referents in reality. Furthermore, this form of uncertainty does not signal in any essential manner the correct identity. Due to this dissonance between this form of uncertainty and certainty, the uncertainty has no value for helping one to make informed judgments since the representation is incorrect when judged against reality. On the other hand, the forms of uncertainty associated with *gharar* enable counterparties to make informed legal and commercial decisions about specific transactions. Furthermore, these forms of uncertainty implicitly indicate what the counterparties must do to acquire certainty with respect to a transaction.

Thus, the uncertainty associated with *gharar* and the uncertainty detailed in works of *uṣūl al-fiqh* and *kalām* are functionally and structurally different. To appreciate the

subtle yet significant distinction between the two forms of uncertainty, we need to understand the forms of difference that relates each form of uncertainty to certainty. To be precise, on the one hand, contrary relates certainty to the uncertainty detailed in works *kalām* and *uṣūl al-fiqh*. On the other hand, the privation relates certainty to the forms of uncertainty associated with *gharar*.

Fortunately, Ibn Rushd and Abū Naṣr Muḥammad al-Fārābī (d. 339/950) discuss both the contrary and privation as they relate to representation in great detail in their commentaries of Aristotle's *De Interpretatione*, or *Kitāb al-'ibāra*.³¹³ Ibn Rushd analyzes the privation in response to the question; what is the most perfect and maximal difference in terms of thought: a privation of identity or its contrary? For example, which phrase, “no one is just,” or “everyone is unjust,” differs the most from the phrase, “everyone is just?”³¹⁴ Initially, Ibn Rushd claims that the answer may not necessarily reflect the difference that exists in reality. For example, the statements, “life is good” and “death is bad” are contraries ontologically and logically, but from the perspective of the mind these two statements are not different, but are actually mutually entailed (*talāzum*).³¹⁵ The position that the greatest difference—whether the contrary or privation—may not reflect reality would upend the traditional subordination of representation to existence by making the thought primary in the validation of representation.

Ibn Rushd, however, saves the primacy of existence in representation by arguing that the greatest difference between two statements is the privation. Unlike a contrary,

³¹³ For further biographical details, see EI², s.v. al-Fārābī.

³¹⁴ Ibn Rushd, *Ibāra*, vol. 1, p. 127.

³¹⁵ Ibn Rushd, *Ibāra*, vol. 1, p. 128.

privation preserves the concept and referent of a specific identity. The only difference between the privation and the identity is that former denies the existence of the relationship that occurs with the latter. Or to put differently, the privation is simply the negation of the identity between a specific thought and referent. The identity thus must precede its privation. Furthermore, the identity is discursively simpler than its privation. In fact, Ibn Rushd compares the relationship between identity and privation to that between existence and non-existence. This last point reaffirms the subordination of difference and more broadly representation to existence.³¹⁶

On the other hand, Ibn Rushd claims that with a contrary multiple referents, concepts, and statements occur such that there is no guarantee that the mind will recognize the differences between the statements as with the case of the life and death.³¹⁷ To understand that life and death are contraries and essentially different, one would need to know the hierarchically superior concept that opposes life to death. Thus with identity and privation there is merely one viewpoint that is modified by means of a negation, but with contraries the viewpoints proliferate as the concepts and referents do.

Although Ibn Rushd does not comment on how a privation relates to uncertainty, al-Fārābī offers some tantalizing remark into this relation. In his commentary on *De Interpretatione*, al-Fārābī (d. 339/950) argues that privation is more different than contrary since privation and identity engender a greater level of *shubha*, *tashakkuk*, and

³¹⁶ Ibn Rushd, *Ibāra*, vol. 1, pp. 128-131.

³¹⁷ Ibn Rushd, *Ibāra*, vol. 1, pp. 128-131. According to Ibn Qudāma one cannot define something by either by using itself, since this is tautology, or by negating its contrary. He unfortunately, does not explain the last reason, but it is possible that he agrees with Ibn Rushd about the ambiguity of contraries. Ibn Qudāma, *Rawḍat*, 7.

ḥayra, or uncertainty and confusion. According to him, in the case of privation and identity one knows that either the privation or identity is essentially correct. On the other hand, in the case of the contraries, no contrary may be correct such that the correct viewpoint is never necessarily entailed as in the case of identity and privation.

Admittedly, Fārābī's argument is somewhat counterintuitive and strained. In the case of the privation and identity, a person must know that one of the two options is correct according to the reasoning of Fārābī. On the other hand, with contraries, none of the options may be correct. Indeed, the contrary should present more uncertainty.³¹⁸

Nevertheless, Fārābī's opinion is significant since it indicates that privation and identity are essentially bound to a single viewpoint. In *gharar*, the privation of identity that engenders uncertainty is bound to the correct identity that engenders certainty with respect to transaction. To say that one has uncertainty with respect to the description of the good, is to acknowledge that he has not seen or received a verbal description of the general description of the good. I say "general description," because the judgment that one has uncertainty with respect to the description of a good does not indicate the exact referents that one needs to know with respect to a specific transaction. The forms of uncertainty associated with *gharar* thus reveal both a mimetic quality based on an identity, or more correctly a privation of identity between a specific referent and thought of it; and a hierarchy that relates uncertainty with respect to specific referents together in the larger categories of the primary forms of the uncertainty that I examined in the

³¹⁸ Abū Naṣr Muḥammad al-Fārābī, *Sharḥ al-Fārābī l-kitāb arisṭūṭālīs fi'l-'ibāra*, ed. Wilhelm Kutsch and Stanley Marrow, 2 ed. (Beirut: Dār al-Mashriq, 1971), p. 203.

previous chapter. The mimetic and hierarchical qualities of *gharar* indicate a form of rationality that I will examine in more detail in the following chapter.

On the other hand, Fārābī and Ibn Rushd indicate that in the case of contraries, the difference between each identity does not necessarily imply the correct identity. In fact, with contraries, one might not even recognize that they are different. The inability to recognize the difference between contraries does not point the mind to the correct identity. Indeed, each identity may be incorrect at Fārābī states. As the contraries multiply, so do the viewpoints just like with infinite viewpoints of the uncertainty elaborated the works of *uṣūl al-fiqh* and *kalām*.

Uncertainty thus has two different senses depending on its function and the relation of thought and referent. In *gharar* and the wider arena of commercial law, counterparties need to represent their lack of certainty such that they can make informed decisions. However, in the realms of *uṣūl al-fiqh* and *kalām*, the definition of uncertainty has the properties of the contrary that produces multiple viewpoints without necessarily indicating the correct identity and viewpoint. This type of uncertainty functions in the sphere of scholarly debates where one needs a form of uncertainty that explains why one's opponents are wrong and unaware of the error. In addition, this type of uncertainty does not permit a simple teleological construction of the correct identity as it does within *gharar* where one knows what referents must be analyzed. If the uncertainty mentioned in the introductions to works of *uṣūl al-fiqh* and *kalām* had such a simple function no one would make errors since everyone would implicitly know the correct identity as in the case of *gharar*.

Chapter Four

Resemblance and Analogy

In the previous chapter, I examined the role of privation in discussions of *gharar*. According to jurists, *gharar* arises when a specific referent of their legal analysis of a transaction does not exist. The lack of referent in turn causes a lack of thought that creates the forms of uncertainty associated with *gharar*. Notwithstanding the claims of Ibn Rushd that the privation of referent is more different than the contrary of the referent, the privation is still essentially bound to the identity so as to ensure an accurate representation and informed judgment. The dependency of the privation of the referent on its affirmation mirrors the dependency of the forms of uncertainty associated with *gharar* on the forms of certainty that a contract requires to be valid. In the case of *gharar*, the forms of uncertainty indicate the forms of certainty that the counterparties require for the transaction to be legal. Furthermore, in the case of a transaction characterized by *gharar*, the counterparties are conscious of the uncertainty impairing the legality of the transaction.

Notwithstanding the importance of the identity between thought and referent to form an individual representation, no representation exists as an isolated phenomenon. Even the essence of something requires and presupposes a wider matrix to represent and relate it to other essences and accidents. Each representation exists within a schema of representations that enables the construction of typologies and hierarchies of representations. Indeed, the schema forms the backbone of rational thought.

To a certain extent, the previous chapters discussed the rationality of uncertainty and *gharar*. The second chapter revealed a hierarchy of forms of uncertainty associated

with *gharar* and the systems of knowledge that define each form of uncertainty. The previous chapter also indicated that the forms of uncertainty associated with *gharar* represent more general judgments about the referents that are not properly defined for the contract of a specific transaction. Finally, the question of distinguishing between fungible and non-fungible goods requires a schema to relate individual goods within a hierarchy.

In this chapter, I will examine how jurists employ resemblance and analogy to represent transactions characterized by *gharar*. In the discussions of *gharar*, analogy plays two roles. The first role, which scholars of Islamic law are intimately familiar with, is the extension of recognized legal precedent to a new case. The second role coordinates several epistemic systems to represent *gharar* in more complex ways. Throughout this study, we have come across statements that *gharar* is not simply one pole of a binary relation. In order to endow the representation of *gharar* with varying levels, jurists must posit referents that have more than the contrary states of existence and non-existence. Rather, the discourse of jurists must posit referents that are characterized by varying levels of existence.

To understand the possibility of varying levels *gharar*, we need to understand the role of identity in a schema of representation. In his *magnum opus*, *Difference and Repetition*, Gilles Deleuze discusses how the Western philosophical tradition has subordinated difference to the power of identitarian thought. According to Deleuze,

There are four principal aspects to reason in so far as it is the medium of representation: identity, in the form of the undetermined concept; analogy, in the relation between ultimate determinable concepts; opposition, in the relation between determinations within concepts; resemblance, in the determined object of the concept itself. These forms are like the four heads of or the four shackles of mediation. Difference is “mediated” to

the extent that it is subjected to the fourfold root of identity, opposition, analogy, and resemblance.³¹⁹

For Deleuze, this representation of difference, which he refers to as finite representation, inscribes difference within concepts. Identity affirms, whereas difference simply negates identity. In fact, difference can only arise from the negation of an identity. Analogy, resemblance, and opposition are subordinated to the identity between thought and referent.

Deleuze's insight into and critique of identity also applies to the role of identity in discussions of *gharar*. *Gharar*, like the difference of finite representation, relies on identity to form it. Like difference, the privation that engenders *gharar* exists simply as the negation of an identity. Not surprisingly, the forms of uncertainty associated with *gharar* function according to Deleuze's "four shackles of finite representation": identity, opposition, analogy, and resemblance. In order to illustrate the usefulness of Deleuze's insight into role of identity in the representation of *gharar*, I will now analyze several legal discussions about crop sales. In their discussions of these transactions, jurists use opposition, resemblance and analogy to modulate the identity between referent and thought in order to create varying levels of *gharar*.

I. *Qiyās* and *Gharar*

Both pre-modern Muslim jurists and modern scholars of Islamic law have devoted an immense amount of energy to analyzing *qiyās*, which is usually translated as "analogy" notwithstanding the fact that its scope is somewhat wider than forms of

³¹⁹ Deleuze, *Difference*, p. 29.

inductive reasoning. Hermeneutic techniques like *'āmm* and *khāṣṣ* (restricted and unrestricted meaning of a word or statement) and methods of reasoning like *istihsān*, *istishāb*, and *istiṣlāḥ* also use a resemblance to justify the application of a pre-existing ruling to another case. A detailed survey of all of these reasoning methods is beyond the scope of this study, but a brief overview of *qiyās* will orientate us to the role of analogy and resemblance within discussions of *gharar*, where jurists implicitly and explicitly draw on *qiyās*. Just as importantly, these theoretical discussions about *qiyās* reveal the complexity of defining a valid resemblance between two referents.

Jurists generally distinguish between three types of analogies: 1) causal analogy (*qiyās al-'illa*), 2) inferential analogy (*qiyās al-dalāla*), and 3) analogy of resemblance (*qiyās al-shabah*).³²⁰ Jurists devote the majority of their discussions of analogy to the causal analogy. With this analogy, a jurist isolates the rationale (*'illa*) for the law that necessitates (*'illa*) the legal ruling (*ḥukm*) in the original case (*aṣl*) and then applies this ruling to the derivative case (*far'*). The jurist thus extends the ruling on the basis that both cases share the same quality that necessitates the ruling in the original case. The classic example of this analogy is the prohibition of date wine. Jurists extend the Qur'ān's prohibition on grape wine to date wine on the basis of the rationale that the Qur'ān prohibits grape wine due to the fact that it intoxicants.

With the inferential analogy, one extends the ruling of the original case to a derivative case on the basis of some shared legal trait without searching for the underlying rationale behind the law. For example, the Shāfi'īs argue that a minor must

³²⁰ Shīrāzī, *Luma'*, p. 204.

pay *zakāt* on wealth since he must pay the tithes (*‘ushr*) on land that he owns. Since a minor is treated like a major for one form of taxation, he should be treated as such for all forms of taxation.³²¹ With the analogy of resemblance, one justifies an analogy between several competing analogies on the basis of which analogy encompasses the greatest number of similarities between the original case and new case. For example, a slave is analogized to freeman since a slave is like a freeman in four respects but like an animal in one respect.³²²

Notwithstanding the differences between these three forms of analogy, the role of resemblance creates two interconnected problems: 1) to identify a resemblance that necessitates a shared judgment between cases, and 2) to restrict the scope of a resemblance. In his lengthy critique of the use of analogy in law, Ibn Ḥazm sums up these problems by remarking that, “The equality of things does not necessitate the application of the same judgment to them,” and, “Everything in the world is similar in some way!”³²³

With the causal analogy, jurists employ a number of methods to validate a claimed resemblance between two cases. In his study of *uṣūl al-fiqh*, Zysow divides the methods into formalist, which do not accept uncertainty in the elaboration of law, and materialist, which accept uncertainty in the elaboration of law. According to Zysow, the materialist methods include the Shāfi‘ī method of positing of the appropriateness of the shared rationale and the Ḥanafī method of positing the effectiveness of the shared rationale.

³²¹ Shīrāzī, *Luma*, pp. 208-209.

³²² Shīrāzī, *Luma*, p. 209.

³²³ Ibn Ḥazm, *Ihkām*, vol. 7, pp. 68, 76.

In order to validate a resemblance between cases to extend a legal judgment to a new case, Ghazālī developed the method of appropriateness (*munāsaba*), which later Shāfi‘ī adopted. With appropriateness, jurists examine whether a cause is consistent with the five universal principles of the law; namely, the protection of religion, life, thought, lineage, and property.³²⁴ Although Ghazālī claims that the identification of appropriateness is not subject to capricious whims of its practitioners, other jurists disagree and argue that it could lead to uncertainty. The Ḥanafī doctrine of effectiveness (*ta‘thīr*) relates a newly discovered cause to those causes with a certain basis in Scripture or consensus. Some jurists even create a phylum of causes.³²⁵ However, the method of effectiveness inscribes analogies within analogies with the result that one first needs to determine a resemblance between the two sets of causes before then relating them to each other analogically. Such a procedure in effect should lead to an infinite regress of analogies.

According to Zysow, the formal methods consist primarily of consistency and conversion (*tard wa’l-aks*), and testing and exhaustion (*al-sabr wa’l-taqṣīm*). Consistency and conversion validate a cause by showing that every time some trait occurs the same judgment is applied and conversely when it does not appear the

³²⁴ Zysow, *Economy*, pp. 196-204. For discussions of appropriateness that pattern discursively along these lines, see Ghazālī, *Mustaṣfā*, vol. 1, pp. 416-417; vol. 2, pp. 306-307. For further discussions of these five universals, see Muḥammad b. Bahādur al-Zarakhsī, *Al-Baḥr al-muḥīṭ fī uṣūl al-fiqh*, ed. Muḥammad Muḥammad Tāmīr, 4 vols (Beirut, Dār al-Kutub al-‘Ilmīya, 2000), vol. 4, pp. 188-189; Yūsuf b. Muḥammad Mikalātī, *Kitāb Lubāb al-‘uqūl fī radd ‘ala al-falāsifa fī ‘ilm al-uṣūl*, ed. Fawqīya Ḥusayn Maḥmūd (Cairo: Tawzī‘ Dār al-Anṣār, 1977), p. 310.

³²⁵ Zysow, *Economy*, pp. 204-215. For discussions that pattern discursively along these lines see Ghazālī, *Mustaṣfā*, vol. 2, p. 307; Muḥammad b. Muḥammad Bazdawī, *Kitāb fihī ma‘rifat al-ḥujaj al-shar‘īya*, ed. Marie Bernand and Eric Chaumont (Cairo: Institut Français d’Archéologie Orientale, 2003), pp. 60-62, ¶¶. 113-116; Zarakhsī, *Baḥr*, vol. 4, pp. 193-195.

judgment is not applied. On the other hand, with testing and exhaustion, one marshals all the possible causes for a law and then eliminates them one by one until only one cause remains.³²⁶

This brief overview demonstrates some of the ways that jurists configure and validate a resemblance and analogy between cases. The notion of similarity although grounded on that of identity is not a univocal concept. The ways that discourses configure their notions of similarity permit different kinds analogies and enlarge or diminish the scope of particular types of analogy as we will see.

II. The Spectrum of *Gharar*

Previously, we saw that Ibn Rushd al-Jadd and Ibn Ḥazm mock jurists who see uncertainty behind every transaction. Nevertheless, Ibn Rushd al-Ḥafid states that,

Jurists agree that excessive *gharar* in a transaction is forbidden but if there is a little bit it is permissible. They disagree, however, about some things regarding the types of *gharar*. So some attribute a lot of *gharar* to some transactions whereas others attribute a little bit of a licit amount of *gharar* to them.³²⁷

Besides implying that *gharar* has varying levels, the quotation draws into question any objective appraisal of *gharar*. As we have seen and will continue to see below, the different appraisals of *gharar* reflect the different ways that jurists configure identity, resemblance, and analogy.

³²⁶ Zysow, *Economy*, pp. 217-219.

³²⁷ Ibn Rushd, *Bidāya*, vol. 3, p. 1210.

While discussing specific transactions, Ibn Rushd, Bājī, Ibn Qudāma, Shīrāzī, and Sarakhsī refer to excessive, minor, necessary, and/or unnecessary amounts of *gharar*.³²⁸ To the best of my knowledge, Ibn Ḥazm does not indicate whether *gharar* has varying levels. His silence cannot reflect the fact that he traces *gharar* back to only uncertainty of the description of good and that of the delivery date. One form of uncertainty in a transaction is sufficient to cause *gharar* in the view of all of the other jurists.

Perhaps the forms of uncertainty associated with *gharar* that Ibn Ḥazm recognizes do not admit shades of grey. With the delivery date, for example, he requires the exact hour of the delivery. Based on his Zāhirī and Aristotelian allegiances, he views language as a transparent and perfect medium to represent thought and reality. He certainly believes this when it comes to fungible goods. Nevertheless, he agrees that a non-fungible good lacks an objective representation, which draws into question any objectivity and the commensurability of language, thought, and existence as we saw in the second chapter.³²⁹

Rather, variations in the levels of *gharar* require the identification of resemblances and analogies, a procedure that Ibn Ḥazm openly rejects, but sometimes uses to craft counterarguments against opponents. All analogies rely on the ability to isolate a resemblance among the shared elements of a group. Nevertheless, there is never

³²⁸ For examples, see Bājī, *Muntaqā*, vol. 6, pp. 116, 132-133, 150-151, 160, 184, 205, 209, 216, 247, 285, 330, 361-362; 543, 554, 556; Ibn Qudāma, *Mughnī*, vol. 4, p. 48 ¶. 2864; p. 170. ¶. 3086; p. 181, ¶. 3106; p. 218, ¶. 3182; p. 221, ¶. 3184; p. 257, ¶. 3256; Ibn Rushd, *Bidāya*, vol. 3, pp. 1209, 1212, 1215, 1221, 1300-1301, 1369; Sarakhsī, *Mabsūt*, vol. 12:4, p.126; vol. 13:5, pp. 9, 17, 41. Shīrāzī, *Muhadhdhab*, vol. 3, pp. 14, 32, 34-35, 38-39, 42-43, 45, 102, 144, 162, 207, 209, 349-350, 363, 498, 523, 533.

³²⁹ Ibn Ḥazm, *Muḥallā*, vol, 9, p. 105, ¶ 1612.

a clear line that marks when a resemblance is so minimal that no meaningful relationship exists to justify a particular analogy.

III. Ripeness

a. Date Sales and Privation

To begin to appreciate the representation of transactions that have varying levels of *gharar*, we need return to the *salam* contract and some seemingly arcane agricultural sales. As indicated in the second chapter, with the exception of the Ḥanafī, the other schools permit the sale of a fungible good like dates by a *salam* contract, even if it does not currently exist at the time of the contract. Jurists permit this contract on the presumption that the seller can eventually obtain a fungible good in the market. However, the sale of unharvested dates from a particular orchard may have *gharar* since jurists view these dates as unique goods that the seller does not need to replace if they were damaged.

Discussions of the sale of unripe dates from a specific orchard offer important insight into the representation of uncertainty and *gharar*. Unlike the transactions discussed in the previous chapters whose referents either exist or do not, crops develop and thus change according to jurists. This process of development leads in turn to a representation of *gharar* characterized by varying levels. In order to present transactions with levels of *gharar*, jurists must coordinate epistemic systems associated with ontology, epistemology, biological development, and the legal value of acts. We will examine each epistemic system individually and then examine how they are combined to represent varying levels of *gharar*. Notwithstanding the use of analogies and

resemblances to represent these transactions, the discussions of jurists ultimately rely on the privation and affirmation of identity to represent *gharar*.

The first epistemic system that jurists employ to represent transactions that have varying levels of *gharar* is a biological schema of the development of dates. According to *ḥadīths* that exist in several different versions, one may not sell the dates of a specific orchard until their *ṣalāḥ* appears, or until the plants *yazhū*. Some *ḥadīth* also add that one may not sell unharvested grapes until they turn black or wheat until it becomes dry.³³⁰ Although jurists treat the sale of dates, grapes, and wheat as examples of the sale of unripe crops, jurists devote most of their analysis to the sale of unripe dates, which becomes the basis for the discussion of *gharar* in the sale of other crops as we will see.

Returning to the terms *ṣalāḥ* and *zaww* in the aforementioned *ḥadīth*, jurists and traditionists are ambivalent about the meaning of these words. Bājī states that these two words may either be technical agricultural terms, words from a specific dialectic of Arabic, or metaphorical terms that refer to fruit being good and beautiful when ripe.³³¹ Nevertheless, these terms suggest that dates develop rather than the binary states of existence or non-existence.

³³⁰ For examples of these *ḥadīths* in the canonical collections, see ‘Abd Allāh Muḥammad Yazīd b. Bāja, *Sunan*, (Liechtenstein: Thesaurus Islamicus Foundation, 2000), pp. 321-322 (2299-2302); Abū Dāwūd Sulaymān b. al-Ash‘ath. *Sunan*. 2 vols. (Liechtenstein: Thesaurus Islamicus Foundation, 2000) vol. 2, pp. 570-571 (3369-3375); Aḥmad b. Shu‘ayb b. Nasā‘ī, *Sunan*, 2 vols. (Liechtenstein: Thesaurus Islamicus Foundation, 2000.), vol. 2, pp. 737-738 (4535-4539,4043); Muslim b. al-Ḥajjāj al-Qushayrī, *Ṣaḥīḥ Muslim*, 2 vols. (Liechtenstein: Thesaurus Islamicus Foundation, 2000) vol. 2, pp. 650-652 (3941-3943,3944-3956); Muḥammad b. ‘Īsā al-Tirmidhī, *Sunan*, 2 vols. (Liechtenstein: Thesaurus Islamicus Foundation, 2000), vol. 1, pp. 332-333 (1271-11273); Muḥammad b. Ismā‘il al-Bukhārī. *Ṣaḥīḥ al-Bukhārī*, 3 vols. (Liechtenstein: Thesaurus Islamicus Foundation, 2000) vol. 1, pp. 406-407 (2232-2239).

³³¹ Bājī, *Muntaqā*, vol. 6, p. 150.

In fact, jurists argue that dates develop in the following seven discrete phases:

1. The tree produces white blossoms, which are its spadices (*ighrīd*).
2. The white color vanishes from the spadix. Its seeds grow and turn green in the *balah* phase.
3. The green then turns red in the *zahw* phase.
4. It then turns yellow in the *busr* phase.
5. Then it turns a dusky color (*kudra*).
6. The dates then ripen and becomes fresh dates (*ruṭab*).
7. These fresh dates then are dried (*tamr*).³³²

The terms *ṣalāḥ* and *zahw* are said to refer to the point when the dates turn either red or yellow (for the sake of simplicity, I will refer to this stage as “ripe,” notwithstanding the fact that the dates continue to mature after this stage).³³³ One may thus begin to sell unharvested dates between the *zahw* and *busr* stages until they are finally harvested.

The above schema presents the maturation process as clearly defined stages, which enable the categorization of a date on the basis of its equivalence to the standard of a given phase. A date, however, does not go from the *balah* to the *zahw* stage in the blink of an eye. Nevertheless, this typology suppresses the maturation that occurs between these discrete stages so as to enable the first mode of analogical analysis of *gharar* that I will now examine.

Notwithstanding jurists’ recognition of the biological fact that dates develop, they need to relate this biological development against the legal existence of crops. In other words, they correlate the previously examined schema of the biological development of

³³² Bājī, *Muntaqā*, vol. 6, p. 1

³³³ Bājī, *Muntaqā*, vol. 6, pp. 142, 145, 149-150; Ibn Ḥazm, *Muḥallā*, vol. 8, pp. 424-425, ¶ 1450; Ibn Qudāma, *Mughnī*, vol. 4, p. 69, ¶.2898; Ibn Rushd, *Bidāya*, vol. 3, p. 1204; Shīrāzī, *Muhadhdhab*, vol. 3, p. 103. Bājī also transmits several interpretations that state it is when the date turns red. See, Bājī, *Muntaqā*, vol. 6, p. 145.

dates with an ontological schema. According to Ibn Rushd, the sale of crops can theoretically occur during four periods in their development:

1. Either before they exist or afterwards (*qabl an tukhlaq aw ba'd an tukhlaq*),
2. If they exist, the sale is either after they have been harvested or before,
3. If before they have been harvested, it is either before they have ripened or afterwards,
4. With either one of these, it is either an absolute sale (*bay' muṭlaq*), or a sale with a stipulation to leave it to ripen or to harvest them prematurely (*bi-sharṭ al-tabqīya*).³³⁴

This typology uses a series of disjunctions to differentiate and correlate crop development against potential times when the crop is sold. Although my other jurists do not expressly outline this typology, it nonetheless informs their discussions.

Jurists, then, correlate these transactions with an epistemological schema and the legal value of each transaction. For example, jurists prohibit the sales of dates from a specific orchard before they exist due to the general prohibition against the sale of non-existent specific goods (*bay' mā lam yukhlaq*). Elsewhere in their discussions of this issue, jurists claim that the unripe dates of a specific orchard resemble non-existent dates with respect to the amount of *gharar* affecting the sale. Since non-existent dates engender *gharar*, so must unripe dates by analogical extension.³³⁵

The sale of unripe dates and non-existent dates present extreme uncertainty with respect to their delivery and their quality and quantity. According to Ibn Rushd, the

³³⁴ I have introduced the numbers and formatting to draw attention to the central legal and linguistic divisions of this passage. Ibn Rushd, *Bidāya*, vol. 3, pp. 1200-1201.

³³⁵ Bājī, *Muntaqā*, vol. 6, pp. 143-144; Ibn Qudāma, *Mughnī*, vol. 4, p. 63. ¶ 2887; p. 70, ¶. 2901; p. 71, ¶.2902; Ibn Rushd, *Bidāya*, vol. 3, p. 1201; Shīrāzī, *Muhadhdhab*, vol. 3, p. 102.

prohibition against these sales is, “due to the fear of damage (*khawf al-jā’iḥa*), which occurs in most cases (*ghāliban*) before the fruit ripens.”³³⁶ Ibn Qudāma also compares the sale of unripe dates to the sale of milk in the udder of an animal and the sale of a fetus.³³⁷ Furthermore, Shīrāzī argues that the *gharar* that arises from the possible destruction of the dates is with respect to the sales contract, totally unnecessary since one could wait until the dates are ripe to purchase them.³³⁸ Sarakhsī states that these unripe dates are unsuitable for human or animal consumption. Since these dates have no utility, he argues that they cannot even be considered property that possesses any commercial or legal value (*māl mutaqaawwim*).³³⁹

Notwithstanding all of this uncertainty, Bājī sheds some light on why one would try to buy these unripe dates. According to him,

Gharar exists (*mawjūd*) before and after the *ṣalāḥ* of the dates appears, but the only reason to buy them before the appearance of the *ṣalāḥ* is that the dates are cheaper. So either a third or less of them will be destroyed or the dates will be delivered in which case they are cheaper. In most cases after the appearance of the *ṣalāḥ* there is a point since the dates have some utility dates (*al-intifā’ bihā*) such as eating fresh fruit. So for this reason the sale of dates after this point in their maturation is licit and the *gharar* is negligible (*‘afā ‘an al-gharar*).³⁴⁰

In other words, one accepts the high chance of the destruction of the dates and uncertainty with respect to their delivery by buying them early in order to save money.

³³⁶ Ibn Rushd, *Bidāya*, vol. 3, p. 1204.

³³⁷ Ibn Qudāma, *Mughnī*, vol. 4, p. 63. ¶ 2887; p. 70, ¶. 2901; p. 71, ¶.2902.

³³⁸ Shīrāzī, *Muhadhdhab*, vol. 3, p. 102.

³³⁹ Sarakhsī, *Mabsūṭ*, vol. 12:4, pp. 195.

³⁴⁰ Bājī, *Muntaqā*, vol. 6, p. 144.

This passage thus inversely relates value and *gharar*. There is some evidence that merchants engaged in such practices. In a letter from the Cairo Geniza, a Jewish merchant warns his son against buying unharvested flax through a pre-purchase contract with a full down payment at a cheaper price than harvest price due to the excessive risk that this transaction presents.³⁴¹

At the other end of the spectrum of crop sales is the sale of harvested ripe dates, which presents no uncertainty with respect to the quantity, quality, and future delivery. Jurists assimilate ripe dates that are still maturing but unharvested to the harvested dates. According to Bājī, by waiting until the dates reach this level of maturity, their quality can be known through a visual inspection just as in the case of fully harvested dates.³⁴²

Notwithstanding the permissibility of the sale of ripe dates on the basis of the analogy from harvested dates, this does not imply that this transaction has no *gharar*.³⁴³

Bājī states that,

Gharar before the appearance of the *ṣalāḥ* is preponderant, but afterwards it decreases and becomes unlikely (*yaqill wa-yandur*). A large amount of *gharar* invalidates contracts, but a little bit is tolerated since contracts being completely safe from *gharar* is impossible.³⁴⁴

³⁴¹ Moshe Gil, ed., *In the Kingdom of Ishmael*, 4 vols. (Tel-Aviv and Jerusalem: Tel-Aviv University, the Ministry of Defense, and the Bialik Institute, 1997), vol 3, pp. 639-640, no. 491. For a complete translation of this entire letter, see Shlomo Simonsohn, trans., *The Jews in Sicily*, (New York: Brill, 1997), vol. 1, pp. 195-196, no. 101; for a partial translation of the letter with this quotation, see Jessica Goldberg, *Trade*, p. 102.

³⁴² Bājī, *Muntaqā*, vol. 6, p. 148. For the views of the other jurists, see Ibn Qudāma, *Mughnī*, vol. 4, p. 63. ¶ 2887; Ibn Rushd, *Bidāya*, vol. 3. p. 1203; Shīrāzī, *Muhadhdhab*, vol. 3, pp. 101-104.

³⁴³ Bājī, *Muntaqā*, vol. 6, p. 144.

³⁴⁴ Bājī, *Muntaqā*, vol. 6, p. 144.

Although Bājī does not say so expressly, presumably this residual *gharar* arises from unlikely events such as a sudden blight or storm. From the time that the dates are ripe until they are harvested the level of *gharar* decreases. Later in the section on crop sales, he provides a three-tiered typology of the levels of *gharar* that we examined previously. According to him,

Gharar occurs in transactions according to one of three levels:

1. A level that is so great and preponderant that it prevents the legal validity of the contract completely such as with the sale of unripe fruit which must remain on the plant to ripen,
2. A level that does not reach this extent in terms of the large quantity and commonness (*lā yablugh hādihā al-mablagh min al-kathra wa'l-al-takarrur*). So it does not invalidate the contract, but it prohibits the immediate cash settlement of the contract such as is the case with a wife during her three month *'idda* or the waiting period for female slave (*muwāda'*),
3. A level that is so small and unlikely that it neither invalidates the contract nor the stipulation for immediate cash settlement, such as with madness or leprosy, which may affect a slave a year after his sale, or damage, which may occur after the fruit ripens.³⁴⁵

With the exception of Ibn Ḥazm, the other jurists either implicitly or explicitly recognize that there are varying levels in the case of the sale of ripe but unharvested dates. For highly unlikely events, jurists ignore *gharar*. In the middle of the spectrum, a variety of legal mechanisms are available to reduce the uncertainty, such as withholding payment or a waiting period to reduce potential uncertainty. Finally, transactions with excessive *gharar* jurists prohibit entirely.

In summary, the sale of unharvested dates reveals the four moments of representation: identity, resemblance, opposition, and analogy. The discussion of the sale

³⁴⁵ Bājī, *Muntaqā*, vol. 6, pp. 150-151.

revolves around the following systems of contraries: unripe and ripe, non-existent and existent, uncertainty and certainty, and illicit and licit. Jurists correlate these systems of oppositions such that unripe = non-existent = uncertainty = illicit sale; and ripe = existent = certainty = licit sale. Notwithstanding the fact that one may sell ripe dates on the tree, jurists acknowledge there is *gharar*, albeit a licit amount, that decreases as the dates continue to ripen. The *gharar* ceases once the dates are harvested.

Although these four planes are correlated, they can be categorized into two groups. Whereas the ontological (existence/non-existence) and legal (licit/illicit) contraries are discontinuous contraries, the systems for the ripeness and knowledge are spectrums. Jurists map the epistemological spectrum onto the system of ripeness to indicate that a transaction can have more or less *gharar* depending on the level of ripeness.

b. Ibn Ḥazm and Wheat Sales

In the previous section, I noted that some *ḥadīths* prohibit the sale of unripe dates, grapes, and wheat. Although jurists treat these three transactions as examples of the sale of unripe crops, the sales of wheat and dates are not discursively the same. In his discussion of wheat, Ibn Ḥazm relies on hermeneutic tools in order to largely sidestep the use of analogy that jurists revel in with their discussions of the sale of dates.

Unsurprisingly, Ibn Ḥazm's analysis focuses on the *ḥadīths*, which state that, “the Prophet prohibited the sale of dates until they ripen (*ḥattā yazhuwa*) and ears of wheat

until they are dried (*al-sunbul ḥattā yubayyaḍ*).³⁴⁶ On the basis of the word *ḥattā* (until), he reasons that one cannot sell wheat from the time that the ears, *sunbul*, appear until they dry. Conversely, one may buy wheat that is growing in the field before the ears of wheat appears.³⁴⁷ In other words, from the perspective of the other schools, he would permit the sale of “unripe” wheat and prohibit its sale from the time it is ripe until harvested. This is just the opposite position of the other schools with respect to the sale of dates.

Due to his distinctive hermeneutical approach, Ibn Ḥazm permits the sale of immature wheat. Although he discusses this transaction in a section devoted to transactions affected by *gharar*, he does not rationalize his position on the basis of *gharar*. The only uncertainty that arises for him in this transaction is when the buyer does not harvest the wheat soon enough so that new stalks of wheat, whose ownership is contested, grows. In this case, however, the buyer gets only what he purchased if this can be established, or the counterparties share the disputed quantity.³⁴⁸

Ibn Ḥazm concludes his analysis by stating that the word “*sunbul*” refers to wheat, barley, millet, and any other type of grain.³⁴⁹ Undoubtedly, Ibn Ḥazm would argue that he has not analogized wheat to these other grains since the word *sunbul* denotes these plants too. In other words, he would frame the resemblance between these grains as lexical. As mentioned above, jurists discuss the overlap between analogy and

³⁴⁶ Ibn Ḥazm, *Muḥallā*, vol, 8, p. 405, ¶ 1432.

³⁴⁷ Ibn Ḥazm, *Muḥallā*, vol, 8, pp. 404-405, ¶ 1432. For a discussion of *ḥattā* with the following verb in the subjunctive to mean until, see W. Wright, *Grammar*, vol. 2, p. 29-30.

³⁴⁸ Ibn Ḥazm, *Muḥallā*, vol, 8, p. 404, ¶ 1432.

³⁴⁹ Ibn Ḥazm, *Muḥallā*, vol, 8, pp. 404-405, ¶ 1432.

the hermeneutical techniques of *'āmm* and *khāṣṣ*, or restricted and unrestricted reference respectively, in works of *uṣūl al-fiqh*. For Ibn Ḥazm, however, the resemblance created by *'āmm* and *khāṣṣ* has an objective basis in the language whereas analogy reflects subjective appeals to resemblance.

c. Other Crops

In the first centuries of Islam, a second agricultural revolution of sorts occurred. A variety of new crops and new strands of crops were disseminated not only throughout the Middle East, but also Europe. In addition, new agricultural techniques such as fertilization and irrigation increased the productivity of agriculture. These changes had profound social and economic consequences for society. In particular, the increased productivity lead to a surplus of wealth that enabled the growth of cities, state bureaucracies, and a caste of scholars like those examined in this study.³⁵⁰

This agricultural revolution also affected the elaboration of law. Jurists had to examine and assimilate these new crops and agricultural techniques to body of established law. In terms of *gharar*, the *ḥadīth* that discuss *gharar* due to the sale of immature crops mention only dates, grain, and grapes. Jurists thus attempt to analyze *gharar* in the sale of other crops.

In the discussion about the sale of dates, we saw how jurists coordinate several epistemic systems and analogies to represent the level of *gharar* associated with a

³⁵⁰ For further details about this revolution, see Andrew Watson, *Agriculture Innovation in the Early Islamic World: The Diffusion of Crops and Farming Techniques, 700-1100* (New York: Cambridge University Press, 1983).

specific transaction. Beside dates and wheat, jurists also use analogy to extend the discussion of date sales to analyze the level of maturity that other crops must reach before their sale. As in the case of dates, jurists discuss the physical traits that differentiate ripe from unripe crops, but these distinctions are much more elementary than those used for dates. Furthermore, jurists also introduce the edibility (*tāb*) of produce as a criterion to define the ripeness of different fruits and vegetables. In fact, Ibn Qudāma states that all crops may be sold once they become edible.³⁵¹

For example, all of the jurists discuss the sale of cucumbers. Both Bājī and Shīrāzī permit the sale of cucumbers or any type of fruit once they reach their maximum size before their sale (*yatanāhā ‘iẓamuhu*).³⁵² On the other hand, Ibn Ḥazm and Ibn Qudāma state that size is irrelevant for determining ripeness.³⁵³ Ibn Qudāma claims that his position more closely resembles the standard employed for determining the requisite level of maturity of dates (*ashbah bi-ṣalāḥihi*) than the Shāfi‘īs’ position. According to him, an analogy from dates indicates that other crops do not have to stop growing before they may be sold, rather they simply need to become edible.³⁵⁴

We saw above that Ibn Ḥazm focuses predominately on grain sales instead of date sales. Although the other jurists also discuss the sale of wheat, only Bājī extends this principle to discussion of chickpeas, peas, lentils, and fava beans. Like in the analysis of

³⁵¹ Ibn Qudāma, *Mughnī*, vol. 4, p. 69, ¶. 2898.

³⁵² Bājī, *Muntaqā*, vol. 6, p. 143; Shīrāzī, *Muhadhdhab*, vol. 3, p. 100.

³⁵³ Ibn Ḥazm, *Muḥallā*, vol. 8, p. 407, ¶ 1434; Ibn Qudāma, *Mughnī*, vol. 4, p. 69, ¶. 2898.

³⁵⁴ Ibn Qudāma, *Mughnī*, vol. 4, p. 69, ¶. 2898.

wheat, Bājī argues that these crops must be dry in order to be sold.³⁵⁵ Both jurists briefly address the sale of flowers. Ibn Ḥazm merely states that the flower must have appeared, but Bājī is more descriptive and states that it must emerge from the spathe. Undoubtedly his use of the term spathe is meant to strengthen the analogy between dates and flowers.³⁵⁶

Finally, Bājī mentions several different plants that the other jurists do not discuss. For example, one may sell sugar cane once it becomes succulent and sweet (*tāb*). As for carrots, garlic, onions, and radishes, he states that they are ripe (*badā ṣalāḥ*) either when each piece of produce is complete, can be separated from the plant and has some utility (*intaḥa'a bihi*), or when one uproots it and there is no rotteness (*lam yakun fī qal'ihī fasād*)³⁵⁷

IV. Contagion of Ripeness

a. Date Sales

In the previous section, I examined the first analogy that jurists employ to represent several levels of *gharar*. Excessive *gharar* occurs when one purchases either a non-existent date from a specific palm, or an unripe date. Jurists analogize immature dates to non-existent ones for their legal analysis. Like all analogies, this one suppresses some aspects of the individuality of referents to create a general class that subsumes

³⁵⁵ Bājī, *Muntaqā*, vol. 6, p. 143; Ibn Qudāma, *Mughnī*, vol. 4, p. 71, ¶. 2902; Ibn Rushd, *Bidāyat*, vol. 3, pp. 1206-1207. Shīrāzī, *Muhadhdhab*, vol. 3, p. 100.

³⁵⁶ Bājī, *Muntaqā*, vol. 6, p. 143; Ibn Ḥazm, *Muḥallā*, vol. 8, p. 407, ¶ 1434.

³⁵⁷ Bājī, *Muntaqā*, vol. 6, p. 143.

several referents. The previous section did not examine whether each date must be ripe before its sale.

In order to address this issue, jurists employ another analogy to delineate *gharar* across time and space. Excluding Sarakhsī and Ibn Ḥazm, who does not address this issue, the other jurists hold that if fruit of one palm is ripe the same **species** (*naw' /šinf*) of fruit in the **same** orchard may also be sold whether ripe or not (for reasons that will become apparent I have highlighted these two words). Jurists reason that when some members of the species are ripe the rest will soon follow.³⁵⁸ According to Ibn Rushd,

The ripeness that Mālik meant is with respect to one type of fruit in which ripeness exists (*wujūd al-izhā'*) in some of them as long as some of them do not ripen a lot earlier than the rest, but rather when the ripening occurs continuously. This is because in most cases the time when fruit becomes safe from damage is when it begins to ripen continuously without stopping."³⁵⁹

Bājī adds that when some particular individuals of a specific species of dates are ripe they are all generally safe from potential damage and “their quality can be known by the visual inspection of the ripe fruit (*ma'lūm al-šifa bi-ru'yat mā ṭāb minhā*).”³⁶⁰ This analogy creates a resemblance by suppressing the physical differences between dates. However, jurists deny the efficacy of these analogy in case of plants whose individual fruits ripen at extremely different times. In this case, since the individuals ripen at

³⁵⁸ Bājī, *Muntaqā*, vol. 6, pp. 147-148; Ibn Qudāma, *Mughnī*, vol. 4, pp. 67-68, ¶.2894; Shīrāzī, *Muhadhdhab*, vol. 3, p. 102.

³⁵⁹ Ibn Rushd, *Bidāya*, vol. 3, p. 1205.

³⁶⁰ Bājī, *Muntaqā*, vol. 6, p. 148.

varying rates, the individuals effectively lack any specific identity that would permit an analogy.

Jurists also must determine how far to push the analogy from individual to individual. Bājī and Shīrāzī both state that dates of the same genus may be sold if a member of one of the species of the genus is ripe since all members of the genus are safe at this point.³⁶¹ On the other hand, Ibn Qudāma argues that there is no compelling reason to assume that members of the same genus will ripen together and provide insight into quality of the different species.³⁶²

The Mālikīs push the resemblances the furthest to argue that when members of the same genus have ripened, members in neighboring orchards may also be sold.³⁶³ Bājī reasons that all dates of the same genus are safe from potential damage at this point. The fact that walls divide the ownership of the land does not increase the level of *gharar* of date transactions in these neighboring orchards.³⁶⁴

Shīrāzī and Ibn Qudāma, however, reject pushing a resemblance this far to justify an analogical representation of *gharar* across space. Ibn Qudāma states that the permission to sell all of the dates of the same type in a specific orchard is to prevent the confusion, hardship, and potential harm (*ḍarar*) that might arise from selling the dates piecemeal and to different buyers. However, with different orchards, these potential

³⁶¹ Bājī, *Muntaqā*, vol. 6, p. 147.

³⁶² Ibn Qudāma, *Mughnī*, vol. 4, pp. 67-68, ¶.2894.

³⁶³ Ibn Rushd, *Bidāya*, vol. 3, p. 1205.

³⁶⁴ Bājī, *Muntaqā*, vol. 6, p. 148.

problems do not arise so that the *gharar* associated with a particular orchard should be considered individually.³⁶⁵

Unlike the other jurists, Sarakhsī rejects the use of analogy to assess *gharar* in these sales since it undermines the fundamental categories of representation. According to him,

Mālik holds that the existence of the attribute of monetary value in some of what is intended for purchase is deemed to be like its existence in all (*wujūd ṣifat al-mālīya wa'l-taqawwum fī shay' mim mā huwa al-maqṣūd yuj'al ka-wujūd al-kull*) due to the need for this... Thus, he makes what has ripened the analogical base (*aṣl*) for what may later ripen (*taba'an lahu*). However, we hold that Mālik combined the non-existent with the existent in this contract (*jama'a bayn al-ma'dūm wa'l-mawjūd*). The non-existent cannot be sold in this case and the existent is unknown. One may give what does not literally exist a legal existence (*ḥaqīqat al-mawjūd hukman*) on the grounds of necessity since otherwise a contract for it would be impossible once it really exists. But fruit only permits a contract after it comes into existence.³⁶⁶

In the clearest terms possible, Sarakhsī subordinates the epistemological contraries of certainty and uncertainty to the ontological contraries of existence and non-existence.

Sarakhsī, however, deconstructs the positions of the other schools, which he claims undermine the fundamental ontological, epistemological, and commercial categories used to represent transactions. Ibn Qudāma, Shīrāzī, Bājī, and Ibn Rushd represent the *gharar* of date sales on the basis of the dates specific or generic identity, which suppresses the individual differences of actual dates in order to create analogies. By ignoring the individual differences among dates in favor of their specific or generic identity, Sarakhsī

³⁶⁵ Ibn Qudāma, *Mughnī*, vol. 4, p. 68, ¶.2895; Shīrāzī, *Muhadhdhab*, vol. 3, p. 102.

³⁶⁶ Sarakhsī, *Mabsūt*, vol. 12:4, p. 197.

argues that one collapses the ontological and epistemological categories that coordinate the representation of the individual date.

For Sarakhsī, these jurists live in a topsy-turvy world where the non-existent exists, uncertainty is certainty, and the illicit is licit. Needless to say if he thinks each date must be ripe before being sold, he would forbid the sale of unripe dates because members of a different genus or in a different orchard are ripe. Nevertheless, Sarakhsī acknowledges that sometimes one must endow the non-existent with a legal existence for practical reasons. In other words, he admits that discursive practices function to configure the existence of referents and knowledge of them.

According to the other jurists, waiting for each date to ripen creates an inordinate hardship of examining each date. In addition, selling one date per sale could lead to contested ownership or uncertainty if there were multiple buyers and each date's ownership is not detailed through some system of labeling or record keeping.³⁶⁷ Although Sarakhsī does not respond to his argument, he would undoubtedly have turned it on its head. For the other jurists, one can analogize from the ripeness of some dates as long as the rest of the dates ripen around the same time. Sarakhsī would probably argue that the fact that all of the dates will ripen soon means that in a few days one will be able to sell the dates without the sale having any *gharar*.

³⁶⁷ Bājī, *Muntaqā*, vol. 6, p. 144; Ibn Qudāma, *Mughnī*, vol. 4, p. 67, ¶.2894; Shīrāzī, *Muhadhdhab*, vol. 3, p. 104.

b. Other Plants

Jurists also examine how ripeness affects the sale of other crops. Although these jurists discuss many of the same plants, they have a variety of positions and discursive styles that affect the conception of crops and ripeness. Ibn Rushd and Bājī discuss the sale of ripe plants systematically by creating a phylum of plants. Ibn Rushd differentiates between plants that produce one crop (*baṭn*) in a season like dates and those that produce multiples crops. According to him, disagreements arise with respect to plants that produce multiple crops in a season, which may explain why Bājī does not discuss the first type.³⁶⁸

Regardless of this difference, both jurists differentiate plants that produce multiple crops throughout one season and crops that do not. For example, figs produce multiple crops but in a discontinuous manner throughout the season. Due to the gap between different crops of figs, the counterparties to a transaction can distinguish an earlier crop from a later crop of figs. Ibn Rushd thus states, “One may not in this case sell what has not been created with what has already been created (*lam yakun bay‘ mā lam yukhlaq minhā dākhilan fī-mā khuliqa*).”³⁶⁹ As we saw above, Ibn Rushd treats unripe dates just like non-existing dates.

As for plants that produce crops continuously, each crop can either be distinguished from other crops on the same plant or not. In the case of leeks and sugar cane, the crops grow continuously but are distinguishable. According to Bājī, what has

³⁶⁸ Ibn Rushd, *Bidāya*, vol. 3, p. 1213.

³⁶⁹ Ibn Rushd, *Bidāya*, vol. 3, p. 1213.

appeared (*mā zahara minhu*) belongs to the buyer, but anything that grows subsequently belongs to the seller, who still owns the plant.³⁷⁰ Bājī also examines whether one may purchase these future crops at the present. According to Ashhab, Mālik allows this type of purchase with leeks, but forbids it when the future produce grows much later, “*khilfatuhu takhallafat.*” Bājī admits that the common interpretation of this phrase, *khilfatuhu takhallafat*, implies that this transaction is impermissible due to a difference in the quality of the future crops. We might even hazard to say that Mālik prohibited this transaction due to uncertainty with respect to the quality and quantity of the future crops. Bājī, however, analogizes this sale to those of dates or grain on the basis that some members have already reached the requisite level of maturity. This analogy ignores the fact that the dates are currently growing on the tree, but in the case of these plants the produce does not exist at the moment of the contract. In fact no sooner does Bājī make this analogy then he states that one may not sell dates that a tree will produce over several years.³⁷¹

Notwithstanding this problem, Bājī claims that Mālik permits these sales when the future crops are assured (*khilfatuhu ma’ mūna*) and likely to exist. However, the counterparties in this case must designate a specific number of harvests,

That this plant will certainly produce whether that is one harvest, five, or more as long the failure to produce crops or their change is not feared. This is because this number can be distinguished and appraised by the number of harvests and crops. If the crops change or fall short of a predefined quality... the seller shall return a proportional sum of money to the buyer.³⁷²

³⁷⁰ Bājī, *Muntaqā*, vol. 6, p. 154.

³⁷¹ Bājī, *Muntaqā*, vol. 6, p. 154.

³⁷² Bājī, *Muntaqā*, vol. 6, p. 154.

This passage uses probability to assess the *gharar* and value of this transaction. The past history of the plants serves as the basis for future expectations based on the use of analogy.³⁷³ Nevertheless, Bājī recognizes that this method of analysis may fail to accurately predict the future harvest. In such cases, the buyer gets some of his money back by determining the value of each harvest that has been completed successfully in relation to the total value of the contract.³⁷⁴

Finally, with cucumbers, eggplant, and pumpkins, which have new crops that grow continuously throughout the season, one may sell what has not yet appeared on the basis of what has.³⁷⁵ Ibn Rushd clarifies this by stating,

It is impossible to segregate the initial crop from the last one, so it is permissible to sell what does not exist together with what does and is ripe (*mā lam yukhlaq ma‘a mā khuliqa wa-badā ṣalāḥuhu*). The legal basis for this is the sale of unripe fruit together with ripe fruit. This is because Mālik analogizes *gharar* with respect to the quality of a good to that of its corporeal existence (*li-anna al-gharar fī l-ṣifa shabbahahu bi’l-gharar fī ‘ayn al-shay’*). It is as if he holds that the exemption should apply to all of the crops of the fruit, by which, I mean the sale of unripe fruit on the basis of ripe fruit, due to necessity. So the legal basis of his view is that there is unavoidable *gharar*, which is permissible (*al-aṣl ‘indahū anna min al-gharar mā yajūz li-mawdi‘ al-ḍarūra*).³⁷⁶

As mentioned in the previous chapter, Ibn Rushd relates certainty with respect to the description of a good to that of its existence. *Gharar* affecting unripe dates is compared

³⁷³ Bājī, *Muntaqā*, vol. 6, p. 154.

³⁷⁴ Bājī, *Muntaqā*, vol. 6, p. 154.

³⁷⁵ Bājī, *Muntaqā*, vol. 6, pp. 154-155.

³⁷⁶ Ibn Rushd, *Bidāya*, vol. 3, p. 1214.

to *gharar* affecting ripe ones on the basis that they share the same conceptual identity. This argument thus bridges existence and non-existence through the shared conceptual identity of dates. Existence and non-existence are contraries that should only relate to each other through a higher concept, but ordinarily Being stands at the summit of metaphysical systems. However, just as uncertainty cannot be a true equal to certainty, non-existence cannot be a true equal to existence. In this passage, non-existence is subordinated to existence in a double analogy. First, the non-existent crop is analogized to what already exists. Second, the quality and quantity of the non-existent crop are analogized to the quantity and quality of previously existing crops. Thus the non-existent is imbued with determinations that subordinate it to the conceptual identity of ripe crops.

The other jurists present more conservative and discursively monolithic views on these sales. Both Ibn Qudāma and Ibn Ḥazm state that one may not sell cucumbers, eggplants, and jasmine until they appear on the vine. According to Ibn Ḥazm, “One may sell cucumbers once they appear on the plant no matter how small since they can be eaten. However, one may not sell cucumbers, flowers, and jasmine until they appear (*mā lam yazhar*).”³⁷⁷ He then prohibits the sale of these crops or of a second growth of grain because, “this is the sale of what does not exist (*mā lam yukhlaq*) and when it does exist only God knows the quality and quantity. So this is forbidden from every viewpoint and this sale is characterized by *gharar*.”³⁷⁸ Like Bājī and Ibn Rushd, Ibn Ḥazm recognizes the link between the existence of something and certainty with respect to its quality and

³⁷⁷ Ibn Ḥazm, *Muḥallā*, vol, 8, p. 407, ¶ 1434.

³⁷⁸ Ibn Ḥazm, *Muḥallā*, vol, 8, p. 407, ¶ 1434.

quantity. However, in this transaction, he denies any conceptual identity between the existing and the non-existing that would allay concerns about *gharar*. As for Ibn Qudāma, he claims that the Mālikīs permit the sale of the non-existing on the basis of the existing due to the difficulty of distinguishing the different growth of crops on a plant. He, however, denies the need for this analogy with respect to these plants.³⁷⁹

Like Bājī, Shīrāzī recognizes that uncertainty arises when plants produce multiple crops such that the sold crop cannot be distinguished from subsequent crops. The majority opinion prohibits the transaction because the sold crops cannot be delivered in accordance with the contract (*ta'adhdhur al-taslīm al-mustahaqq bi'l-'aqd*) since the seller does not need to turn over fruit that belongs to him. Likewise, due to the uncertainty with respect to what belongs to whom, the buyer does not have to accept delivery. However, a minority position argues that the good enters the buyer's possession and accrues more fruit as in the case of the sale of a slave who grows while in the possession of the seller.³⁸⁰ A more modern analysis of this analogy would be to say that fruit compounds similar to the way that money compounds through interest. The majority, however, responds by stating,

This increase of the slave has no legal affect (*lā hukm lahu*), thus the seller must deliver the slave notwithstanding growth or additional weight. But in the case of these legumes the seller does not have to deliver them. So this indicates the distinction between these two transactions.³⁸¹

³⁷⁹ Ibn Qudāma, *Mughnī*, vol. 4, p. 70, ¶. 2899.

³⁸⁰ Shīrāzī, *Muhadhdhab*, vol. 3, p. 105.

³⁸¹ Shīrāzī, *Muhadhdhab*, vol. 3, p. 106.

According to this argument, the change in the slave has no bearing on the fact that the seller must still deliver the slave to the buyer.

There are important differences between the discussion of Shīrāzī and those of the jurists whom we examined previously. For the other jurists, the central point of their discussions concerns the conditions under which they may analogize existence to non-existence in order to obtain certainty with respect to the transaction and assess the level of *gharar*. Furthermore, the previous jurists either relate any analogy between the various date sales and sales of other plants and crops, or they deny that such an analogy can be made. With Shīrāzī, the focus switches to the ability to deliver the crop. For sure, the ability to deliver something and its existence are interconnected. However, he does not focus on the question of whether the crops will ultimately exist. Rather, his concern is that once the crops come into existence that they will throw the ownership into contestation and hinder the seller's ability to deliver on the contract.

V. The Sale of Land and Crops

a. Date Orchards

As stated in the discussion about *qiyās*, the challenge with validating any analogy is asserting the validity of resemblances between the traits that are claimed to be the basis of the analogy. In the previous discussion, we saw how jurists created analogies based on the resemblances among the produce of plants to represent the level of *gharar*. However, jurists also discuss the *gharar* associated with the sale of crops from a specific orchard or field through two different sets of transactions. First, the buyer may buy the fruit at any

level of maturity if he immediately cuts it off of the palms.³⁸² Ibn Qudāma states that cutting the dates off the tree removes all fear of their potential destruction.³⁸³ Bājī elaborates on this point by stating that this transaction has no *gharar* since there is no possibility for the fruit to increase or decrease—presumably in quantity or quality.³⁸⁴

Second, jurists agree that if the seller has pollinated the date palms he may sell the palms, but keep the dates that grow from his pollination and leave them to mature until harvest time unless the buyer stipulates his purchase of the resulting dates in the contract.³⁸⁵ In effect, the seller may sell these unripe dates with the palms. The level of ripeness of the dates is thus irrelevant in this transaction and the relevant trait for the representation of the *gharar* associated with this transaction is the orchard and pollination of the palms. However, Bājī, Ibn Qudāma, and Shīrāzī analogize this sale to that of a pregnant animal or slave. Before the trees are pollinated or animals’ pregnancies become manifest (*kāmin/bāṭin*), one cannot except the potential offspring. Thus one could not sell a cow that does not appear pregnant with the clause that the seller gets a calf if the cow turns out to be pregnant. However, once the palms are pollinated their “pregnancies” are manifestly distinguishable (*zāhir/tamayyuz*), so that the seller may keep or sell them.³⁸⁶ This analogy relies on the fact that the date palm is a dioecious plant, or to put it plainly

³⁸² Ibn Rushd, *Bidāya*, vol. 3, p. 1201.

³⁸³ Ibn Qudāma, *Mughnī*, vol. 4, p. 63, ¶.2886.

³⁸⁴ Bājī, *Muntaqā*, vol. 6, p. 144.

³⁸⁵ Ibn Ḥazm, *Muḥallā*, vol. 8, pp. 424-427, ¶ 1450-1453; Ibn Rushd, *Bidāya*, vol. 3, pp. 1272-1274.

³⁸⁶ Bājī, *Muntaqā*, vol. 6, p. 139; Ibn Qudāma, *Mughnī*, vol. 4, pp. 51-52, ¶.2868, Shīrāzī, *Muhadhdhab*, vol. 3, pp.93-94, 100-103.

each palm is either male or female. In order to maximize fruit production, typically an orchard has only female date palms, which requires the manual pollination of each palm.³⁸⁷

However, this argument ignores the uncertainty that arises from the sale of unripe dates as we saw above. Ibn Qudāma merely states that one may sell the pollinated palms with their future fruit since the possibility of *gharar* poses no danger in this case just like the sale of sheep along with the milk in its udder (*lam yaḍurr iḥtimāl al-gharar fīhi*).³⁸⁸ We might speculate that jurists permit this transaction since the fruit represents such a small part of the value of the transaction. Indeed, this line of reasoning will appear in the following section where I examine the sale of other types of plants.

This transaction raises many of the same questions as the sale of dates after they ripen. Does every tree of an orchard need to be pollinated in order to qualify for this transaction? Ibn Ḥazm argues that the seller may only stipulate that he retains the fruit of pollinated trees. Furthermore, since the *ḥadīth* employs the plural for date trees, he states that buyer must exercise his right to take the fruit of at least three or more trees.³⁸⁹ On the other hand, both Shīrāzī and Ibn Qudāma treat all of the trees as if they were pollinated in accordance with the general principle that the imperceptible is assimilated to the perceptible (*yatba‘ al-bāṭin al-ẓāhir*).³⁹⁰ This rule applies to members of the same species

³⁸⁷ For further details, see V.H.W. Dowson, *Dates and Date Cultivation of the ‘Iraq: Part I. The Cultivation of the Date Palm on the Shat Al ‘Arab* (Cambridge: W. Heffer and Sons Ltd., 1921), pp. 27-28.

³⁸⁸ Ibn Qudāma, *Mughnī*, vol. 4, p. 63, ¶.2887.

³⁸⁹ Ibn Ḥazm, *Muḥallā*, vol. 8, pp. 425-426, ¶¶ 1450-1453.

³⁹⁰ Ibn Qudāma, *Mughnī*, vol. 4, p. 53, ¶. 2869; Shīrāzī, *Muḥadhdhab*, vol. 3, p.95.

to prevent the confusion and hardship that would arise from selling each palm individually. Furthermore, Ibn Qudāma explicitly states that this opinion in this instance is like his opinion regarding the sale of dates after they have reached the requisite level of maturity.³⁹¹ However, the views of Ibn Qudāma and Shīrāzī diverge with respect to how the pollination of one species of the genus affects other members of the genus. Ibn Qudāma claims that the pollination of one species does not affect other members of its genus since,

The species are unlike each other and one of them can be distinguished (*yatamayyaz*) from the other. So there is no fear of their getting mixed up and resembling each other. Thus, they resemble two different genera...so applying *qiyās* to one of them on the basis of the other is invalid due to their dissimilarity.³⁹²

On the other hand, Shīrāzī argues, when members of the same genus mature together, he treats them all as one species for the sake of the sales of entire orchards.³⁹³

The Mālikīs are divided on this issue. According to Mālik, if an equal number of palms are pollinated and unpollinated in the orchard, the seller keeps the fruit of the pollinated palms and the buyer gets the fruit of the unpollinated ones since the growth of pollinated trees can be distinguished from that of the unpollinated ones. However, Muḥammad b. Dīnār argues that this textbook case involving an equal number of

³⁹¹ Ibn Qudāma, *Mughnī*, vol. 4, p. 53, ¶. 2869; Shīrāzī, *Muhadhdhab*, vol. 3, p.95.

³⁹² Ibn Qudāma, *Mughnī*, vol. 4, p. 53, ¶. 2869.

³⁹³ Shīrāzī, *Muhadhdhab*, vol. 3, p.95.

pollinated and unpollinated palms is improbable (*ma'rifat tasāwiyihimā amr yab'ud*). He thus analogizes the legal status of the unpollinated trees to that of the pollinated ones.³⁹⁴

Finally, this transaction raises interesting implications for the representation of referents within discourse about *gharar*. For jurists, all of the transactions discussed in this chapter present the specter of *gharar* due to the immaturity of the produce from a specific orchard. As we saw above, one may not sell only the unripe dates since they are non-existent from the perspective of jurists. However, when one sells the orchard the sale or retention of these immature dates becomes licit. On the one hand, jurists claim that the counterparties can have certainty with respect to the eventual description and delivery of the dates by virtue of the palms' manual fertilization. Indeed, this claim relies on a great deal of probabilistic reasoning about the future harvest. Notwithstanding their claim that this transaction does not possess *gharar*, jurists also admit that there is uncertainty with respect to the future maturation and harvest of these dates when one sells only unripe dates.

There are two ways to interpret the interaction of the certainty and uncertainty within this transaction. The first interpretation is that the palms provide a wider set of certain referents such that this certainty associated with palms outweighs the uncertainty associated with the unripe dates. Another and the more interesting reading would be that the uncertainty associated with the immature dates actually legitimizes the legality of this transaction. To say that there is uncertainty associated with these date sales is to categorize them as legally non-existent. In this case, their non-existence in relation to the

³⁹⁴ Bājī, *Muntaqā*, vol. 6, p. 139.

rest of the contract would make them legally irrelevant. Unfortunately, the jurists do not provide more information to validate either of these interpretations. Indeed, these interpretations may not be exclusive but rather mutually entailed when one considers the fact that the palms represent the majority of the value of the sale.

b. Analogy and the Sales of Other Crops

Finally, Ibn Qudāma, Shīrāzī, and Ibn Ḥazm extend the insights from the discussion of the sale of orchards to the sales other types of plants. To do this, Ibn Qudāma and Shīrāzī analogize other plants to date palms based on the physical features of these other plants that resemble the spathe of a date palm such that occurrence pollination of these plant can be assumed. Not surprisingly, their typologies begin with dates palms and other plants that resemble dates, like cotton and flowers.³⁹⁵ Ibn Qudāma states that,

The first kind has its fruit in a spathe, which later opens, so that the fruit appears, as with dates, which the *sunna* mentions, and we have explained their legal ruling (*ḥukmahu*). This is the legal principle and everything else is analogized and subordinated to it (*huwa al-aṣl wa-mā 'adāhu maqīs 'alayhi wa-mulḥaq bihi*).³⁹⁶

According to Ibn Qudāma, once the spathe of the fruit or calyx (*kimm*) of a flower, which he analogizes to the spathe of dates, opens, the fruit or flower belongs to the seller of the plant unless the buyer stipulates to take the fruit.³⁹⁷ The second type of plant has fruit that neither has a peel nor emerges from a spathe, like figs and berries. When fruits of

³⁹⁵ Shīrāzī, *Muhadhdhab*, vol. 3, p.98.

³⁹⁶ Ibn Qudāma, *Mughnī*, vol. 4, p. 54, ¶. 2872.

³⁹⁷ Ibn Qudāma, *Mughnī*, vol. 4, p. 54, ¶. 2872.

this type appear they are analogized to the spadix (*tal'*) appearing on date trees such that the seller of the plant may keep the produce.³⁹⁸

The third type of plant has fruit with one peel that is removed when the fruit is consumed, such as bananas and pomegranates. Both Ibn Qudāma and Shīrāzī use different technical vocabulary to refer to this type of fruit. Shīrāzī states that this type grows within a spathe or calyx (*kimm*) until eaten. Shīrāzī's use of the word “*kimm*” makes the analogy between this type of fruit and dates more obvious. On the other hand, Ibn Qudāma simply uses the word peel (*qishr*). Irrespective of these terminological differences, both jurists agree that when it appears, the seller may keep the fruit if he sells the tree.³⁹⁹

The fourth type of plant produces nuts that have two protective coats. Once again, the appearance of these nuts is analogized to the spathe or calyx of the previous categories. According to Shīrāzī, the shell is like the peel of the pomegranate whereas Ibn Qudāma states that nuts are like figs in the second category. However, both schools have some dissenters. Some Shāfi'īs analogize nuts to unpollinated date palms claiming that the outer shells are discarded just as the spadix is discarded. Thus, one cannot keep the crop of nuts growing on the trees when he sells the trees.⁴⁰⁰ According to Ibn Qudāma, Abū Ya'lā argues that seller retains the nut when the outer shell splits open as when the spadix opens on a date palm. However, Ibn Qudāma rejects the analogy between nuts and

³⁹⁸ Ibn Qudāma, *Mughnī*, vol. 4, p. 54, ¶. 2872; Shīrāzī, *Muhadhdhab*, vol. 3, p.98.

³⁹⁹ Ibn Qudāma, *Mughnī*, vol. 4, p. 54, ¶. 2872; Shīrāzī, *Muhadhdhab*, vol. 3, p.98.

⁴⁰⁰ Shīrāzī, *Muhadhdhab*, vol. 3, p.99. The Arabic reads: “*istitāruhā bi'l-nawr ka-istitār thamarat al-nakhl ba'd al-ta'bīr bi-mā 'alayhā min al-qishr al-abyaḍ... li'l-bā'I' ma'a istitārihā al-qishr al-abyaḍ.*”

the spadix since the spadix splits for the benefit of the plant, but the shells of nuts seldom split.⁴⁰¹

Finally, there are other types of fruit that grow from pollinated flowers, like apples and peaches. According to Ibn Qudāma and Shīrāzī, if one sells these plants before these flowers have wilted (*tanāthar al-nawr*) and the fruit has started to appear, the fruit belongs to the buyer. On the other hand, once the flowers wilt and the fruit appears, the fruit belongs to the seller unless the buyer stipulates otherwise. However, Abū Ya‘lā reasons that the seller retains the fruit once the flowers bloom since the spadix (*ṭal‘*) of the date palm resembles a flower. Likewise, Abū Ḥāmid Isfirāyīnī, a Shāfi‘ī, argues that the fruit belongs to seller even if the flower has not wilted since in effect,

The fruit has appeared by this budding on the tree and the flower covering it is just like dates being covered by the white peel after their pollination...the dates with this white peel belong to the seller.”⁴⁰²

Ibn Qudāma once again rejects the opinion of Abū Ya‘lā in favor of al-Khiraqī who argues that the bud in the hollow of the spadix is not like the flower of a fruit tree.

Whereas the bud of the spadix becomes a protective skin that covers the dates, the flower petals completely wilt and the fruit appears.⁴⁰³

⁴⁰¹ Ibn Qudāma, *Mughnī*, vol. 4, p. 54, ¶. 2872.

⁴⁰² Shīrāzī, *Muhadhdhab*, vol. 3, p.99. Abū Ḥāmid Aḥmad b. Abī Ṭāhir al-Isfarāyīnī (344-406/955-1016) was the head of the Shāfi‘īs in Baghdad. His students wrote *ta‘liqas*, or collections of legal defenses, from him on the Commentary of Muzanī and *uṣūl-fiqh*. For further biographical details, see Shīrāzī, *Ṭabaqāt al-Fuqahā’* (Beirut: Dār al-Rā’id al-‘Arabī, 1970), pp. 124-126; al-Subkī, *Ṭabaqāt*, vol. 4, pp. 61-76, no. 270. For more details on the role of the *ta‘liqa*, see Makdisi, *Colleges*, pp.111-128. On page 119, Makdisi mentions briefly the *ta‘liqas* of this jurist.

⁴⁰³ Ibn Qudāma, *Mughnī*, vol. 4, p. 55, ¶. 2872.

Finally, both jurists discuss the leaves of plants and flowers. According to Ibn Qudāma, if the plant has leaves or flowers that are commonly desired they belong to the seller once they have emerged from the spathe as when the spadix of the date trees has been pollinated. Flowers and leaves that do not emerge from a spathe are retained by the seller if they are visible at the time of the sale. The only exception to this general rule is the mulberry leaf, which belongs to the seller if the leaf has opened just like fruit that grows from flowers. However, this exception applies only to locales where it is customary to harvest these leaves (*'ādatuhum akhdh al-waraq*).⁴⁰⁴ According to Shīrāzī, his school has two views on the mulberry leaves. The first states that they belong the seller if they have opened just like the fruit of all the other types of trees. The second view states that these leaves always belong to the buyer since it denies the analogy between the leaves and other types of trees. Mulberries are edible fruit like the fruits of the other trees. However mulberry leaves are used as food for silk worms.⁴⁰⁵

Beyond these fruit bearing trees, Shīrāzī and Ibn Qudāma also discuss vegetables, grain, and seeds. Both jurists distinguish between plants that can be harvested multiple times, like mint, narcissus, melons, cucumbers, legumes, and clover; and plants that can be harvested once, like wheat and barley. To the latter type, Ibn Qudāma adds carrots, onions, garlic, and sugar cane. With plants that can be harvested multiple times, both jurists argue that what has appeared belongs to the seller and the rest belongs to buyer.⁴⁰⁶ Ibn Qudāma states that the sale or retention of this immature produce poses no

⁴⁰⁴ Ibn Qudāma, *Mughnī*, vol. 4, p. 55, ¶. 2873.

⁴⁰⁵ Shīrāzī, *Muhadhdhab*, vol. 3, p.97.

⁴⁰⁶ Ibn Qudāma, *Mughnī*, vol. 4, pp. 56-57, ¶. 2875; Shīrāzī, *Muhadhdhab*, vol. 3, p. 99.

uncertainty that could materially damage either counterparty since it is like the sale of pollinated date trees.⁴⁰⁷

As for the sale of land with crops that can be harvested once and then must be replanted, there is a slight difference between the jurists. According to Shīrāzī, these plants are not part of the sale of the land since their growth is clear (*zāhir*) and they will not remain for long.⁴⁰⁸ He does not indicate whether the buyer may stipulate that the plants be included in the sale. Ibn Qudāma, however, remarks that the buyer may stipulate the purchase of the grain at any stage of its growth whether visible or not (*mustatir aw zāhir*). He claims that any uncertainty associated with the incomplete maturation of the plants does not pose a chance of material loss (*lam yaḍurr jahluhu wa-‘adam kamālihi*).⁴⁰⁹ Nevertheless, if the buyer does not stipulate the purchase of the crop, it belongs to seller who may leave it to mature since the time and rent required for the crops to develop can be accurately estimated (*taqaddar bi-baqā’ihi*) and thus excepted from the sale’s value.⁴¹⁰

This short passage of Ibn Qudāma has two contradictory notions of value. On the one hand, he argues for the legality of this transaction on the basis that the uncertainty with respect to the plants is immaterial and cannot be appraised. On the other hand, he argues for the legality of the seller keeping the grain on the basis that the time and implied rent required for the plants to mature is known and can be deducted from the

⁴⁰⁷ Ibn Qudāma, *Mughnī*, vol. 4, p. 57, ¶. 2875.

⁴⁰⁸ Shīrāzī, *Muhadhdhab*, vol. 3, p. 99.

⁴⁰⁹ Ibn Qudāma, *Mughnī*, vol. 4, p. 57, ¶. 2876.

⁴¹⁰ Ibn Qudāma, *Mughnī*, vol. 4, p. 57, ¶. 2876.

value of the sale of the land. Admittedly, it might be easier to value a lease than to estimate the value of the harvest, but Ibn Qudāma does not relate these two values.

Finally, these two jurists discuss the sale of land with seeds planted in it.

According to Shīrāzī, if one sells land with seeds planted in it, the seeds are not part of the sale since they are deposited in the ground (*mūda' al-arḍ*) so they are excluded from the sale of the land, like precious metal ore (*la yudkhal fī bay'ihā ka'l-rikāz*). On the other hand, if one tries to include the seeds in the sale of the land, the school prohibits this on the basis that one cannot sell the planted seeds since whether they will grow is uncertain. Thus, one may not sell them together with the land.⁴¹¹

Ibn Qudāma takes a different approach. According to him, with crops that can be harvested multiple times and release seeds to ensure the continuity of this process—like legumes and mint—the seeds belong to the buyer since they are an integral part of the reproductive process. He analogizes these seeds to the trunks of date trees. If these seeds were visible (*zāhir*) they would belong to the buyer so it is even more appropriate that they belong to him when invisible. In fact this claim is actually the opposite of what we found in the previous sections, where the appearance of pollination entitled the seller to keep or sell the fruit. Notwithstanding this fact, he claims that the seeds of other crops belong to the seller unless the buyer stipulates otherwise.⁴¹²

Turning to Ibn Ḥazm, he briefly discusses the sale of other crops and their plants. According to him, one may sell cucumbers and bananas together with their plants.

⁴¹¹ Shīrāzī, *Muhadhdhab*, vol. 3, p. 100.

⁴¹² Ibn Qudāma, *Mughnī*, vol. 4, p. 58, ¶. 2878.

Admittedly, he does not comment on the level of maturation these types of produce must reach before one sells the plant. Regardless of this oversight, when the one sells the plant, he allow it to remain as long as he wants on his land, although the counterparties cannot stipulate this in the sale. In effect, the buyer gets to use the land of the seller for free and all of the produce until the seller forces him to remove the plants.⁴¹³

VI. Conclusion

Representation relies on identity, opposition, resemblance, and analogy. Although an identity equates a referent and thought of it, a schema employs oppositions, resemblances, and analogies in order to configure individual representations within a larger system. In this chapter, I examined how jurists configure a schema to represent the *gharar* associated with crop sales. The analogies in the analyses of these transactions operate on two interconnected planes. First, for the sale of dates from specific palms, jurists configure a number of contraries like ripe and unripe, existent and non-existent, permissible and impermissible, and certainty and uncertainty in order to analyze the *gharar* associated with these sales. In the case of date sales, the maturation of a date and thus all of the dates of an orchard do not fall into the neat contraries of ripe and unripe. Rather, jurists argue that dates develop along a spectrum. This spectrum allows for a referent that does not fit simply into the ontological categories of either existence or non-existence. After a date becomes ripe it continues to develop until harvested. However, based on several *hadīths*, jurists select a defined point in its maturation and relate that

⁴¹³ Ibn Ḥazm, *Muḥallā*, vol. 8, pp. 407-408, ¶ 1435.

point to the ontological, epistemological, and legal categories. On the basis of the resemblance between the ripe date and an existing referent, jurists create an analogy to represent the *gharar* associated with a transaction for the sale of dates of different species or orchards. However, the certainty that arises from a ripe date is still less than if it were harvested and sold in a cash transaction. The use of resemblance and analogy thus allows for varying levels of *gharar*. Second, this chapter revealed how jurists employ analogy to extend the *ḥadīths* about dates to other crops. In particular, the resemblance between crops is configured primarily in terms of plants' biological properties that resemble those of dates, grapes, and grain. The analogies allow jurist to cut across the differences of time and space to analogize the legal status of different sales.

Finally, for one trying to understand the relationship between the epistemological concerns of *uṣūl al-fiqh* and *fiqh*, it seems puzzling that *ẓann*, or probabilistic knowledge, does not play a constructive role in the elaboration of *gharar*. However, with the role of analogy and varying levels *gharar* perhaps we have found a partial analog to *ẓann*. In discussions of *uṣūl al-fiqh*, *ẓann* lies on a spectrum between the contraries of certainty and uncertainty. With the exception of Ibn Ḥazm who accepts only certainty in the elaboration of law, the other schools accept *ẓann* as the basis of rulings. The discussions encountered in this chapter seem to conform to this pattern from two perspectives. As with *ẓann*, jurists accept a minimal level of *gharar*. Furthermore, Ibn Ḥazm appears to reject levels in *gharar* just as he rejects *ẓann*.

One should, however, not push this analogy too far. As stated in the previous chapter, the uncertainty associated with *gharar* arises from a privation of referent and thought. In the case of the crop transactions, jurists apply the identity of one date to a

larger group of dates to claim that the others will soon safely ripen and thus the transactions present an acceptable level of *gharar*. On the other hand, with *zann*, there is always the possibility of an unrecognizable mistaken identity.

Chapter Five

Exceptions and *Gharar*

In this study, I have examined how discursive knowledge directly creates uncertainty rather than uncertainty being simply a passive given or a momentary error that more thought is destined to overcome. The forms of uncertainty associated with *gharar* do not function in manner contrary to or independent from certainty. Rather, certainty creates and defines the uncertainty associated with *gharar*. To be precise, the second chapter examined the forms of knowledge required to define the forms of uncertainty associated with *gharar*. The third chapter analyzed the role of the privation that engenders certainty, in the representation of the forms of uncertainty associated *gharar*. Notwithstanding the fact that the privation between a thought and a referent engenders the forms of uncertainty associated with *gharar*, it is always bound to and subsumed the aforementioned identity so as to engender valid representations in discussions of *gharar*. Finally, the previous chapter examined how identity, opposition, resemblance and analogy create a schema that relates several epistemic systems so as to represent varying levels of *gharar*. Ultimately, the uncertainty associated with *gharar* functions like certainty and fits into a system of rational thought and representation.

In this final chapter, I will explore what I refer to as the hermeneutical interaction of the referents and the forms uncertainty associated with *gharar*. According to Muslim jurists, the Qur'ān and *ḥadīth* are the primary sources of God's Law. Nevertheless, these sources present a number of interpretive difficulties for jurists. In large measure, *uṣūl al-fiqh* and hermeneutical concepts, such as the restricted (*'āmm*) and unrestricted (*khāṣṣ*) meaning of words, exceptions, and the literal and metaphorical meanings, developed in

response to these interpretive difficulties.⁴¹⁴ These hermeneutical techniques enable jurists to elucidate the comprehension and extension of words and sentences so as to validate particular interpretations.

Interpretive problems are not limited to the Qur'ān and *ḥadīth*. Questions about the comprehension and extension of representations also affect commercial transactions. In terms of *gharar*, jurists analyze the legality of when counterparties except part of a good from a transaction. According to a *ḥadīth*, however, the Prophet prohibited sales in which an exception was made to part of the good of the sale (*bay' al-thunyā*) due to the *gharar* that the exception creates. Jurists typically elucidate this prohibition through the discussion of several different types of crop, livestock, and slave sales. With these sales, the counterparties specify the good, but then except a portion of it for the seller to retain. Like the various kinds of exceptions to rules that jurists discuss in works of *uṣūl al-fiqh* and *kalām*, an exception to a transaction modifies its scope so as to potentially cause *gharar*.

In the case of these transactions, the exception gives rise to two different types of uncertainty that have important implications for any understanding of representation. On the one hand, principally in transactions involving animals and humans, the exceptions engender the standard privation that I examined in the third chapter. On the other hand, in transactions involving fungible non-animal goods like grain and dates, the exceptions engender a form uncertainty that I refer to as aporetic uncertainty.

⁴¹⁴ In works of *uṣūl al-fiqh* and *kalām*, jurists frequently discuss grammatical exceptions to a word or phrase as an examples of *'āmm* and *khāṣṣ*. An exception restricts the reference of word or phrase in the same way that *khāṣṣ* does.

By aporetic, I mean that this type of uncertainty arises from a contradiction in the theory of representation that grounds the discussion *gharar* and the reasons for the application of a ruling to specific cases. To be precise, the Aristotelian model of representation claims that thought and language convey equivalent information through their subordination to reality. Likewise, Islamic commercial law claims that descriptions and visual inspections of fungible goods engender commensurable forms of certainty. Nevertheless, in the case of transactions of grain or dates, exceptions reveal an aporia in which the combination of a verbal description and a visual inspection create uncertainty due to the incommensurability of thought and language. In other words, these transactions reveal a specific case in which language and thought are not commensurable for fungible goods.

I. The Modalities of Sales and Certainty

In their discussions of sales with exceptions, jurists distinguish between sales of animals and non-animals. In the case of non-animals, like grain, dates, houses, and bolts of fabric, the seller excepts and retains ownership over a portion of the good of the sale. Notwithstanding the diversity of goods, the analyses of jurists typically focus on the sale of grain and dates, examples *par excellence* of fungible goods. Before examining these transactions with exceptions, we must first examine how one may exactly sell these goods without any exceptions. This examination offers important insights into how jurists conceive of the representation of these goods.

Bājī offers a systematic discussion of the sale of dates from a specific orchard. In terms of specifying the quantity of dates sold from a specific orchard, Bājī outlines three

ways to effect the sale: 1) the contract specifies a quantity, 2) the contract specifies *all* of the dates of the orchard, on the condition that they amount to a specific quantity, based on an estimation (*bi'l-kharṣ*), and 3) the contract merely covers a bulk quantity, such as a specific pile of dates, without specifying the exact quantity in any manner (*juzāf*).⁴¹⁵

It is tempting to assume that the categories of this typology move from certainty to uncertainty in terms of the quantity of the dates, but such an assumption does not hold. With the first type of sale, the seller defines the exact quantity of dates covered by the contract. Although, Bājī does not detail the mechanics of such a sale or pronounce on its legality, he probably intends a transaction in which one sells a small quantity that is likely to exist, or an amount that has been harvested and measured. Whatever the case, jurists permit this method of sale.

Bājī focuses on the second and third types of sales. According to him, Abū Qāsim forbids the second type of sale, when the seller estimates the quantity, which is then specified in the contract. Qādī Abū Muḥammad states that an estimation (*al-taḥarrī*) of the quantity creates excessive *gharar* and hazard (*khaṭar*) due to the promise of a specific quantity.⁴¹⁶ On the other hand, Bājī permits the third method, the sale of a bulk quantity without specifying its exact quantity (*juzāf*), as long as the buyer visually appraises the quantity of the dates.⁴¹⁷ Likewise, the other jurists agree that one may sell a

⁴¹⁵ Bājī, *Muntaqā*, vol. 6, p. 180, ¶. 1291.

⁴¹⁶ Bājī, *Muntaqā*, vol. 6, p. 180, ¶. 1291.

⁴¹⁷ Bājī, *Muntaqā*, vol. 6, p. 180, ¶. 1291.

pile of grain or bolt of fabric merely on the basis of a visual inspection, which removes uncertainty.⁴¹⁸

It seems paradoxical that a sale based on a visual inspection presents less uncertainty than one that promises a specific quantity. However, the role of estimation in each transaction is legally different from the viewpoint of jurists. When the seller promises that the crop of dates in an orchard or pile of grain has a particular quantity on the basis of his estimation, both counterparties treat this estimation as certain for the purposes of the valuation of the contract. On the other hand, when the counterparties specify the good of the sale simply in terms of the crop of the entire orchard or a specific pile of grain, both parties must independently appraise its quantity. This contract does not explicitly mention this quantity. Thus, while this sale presents uncertainty about the exact economic value of the transaction, there is no uncertainty in terms of the contractual good.

Shīrāzī and Ibn Qudāma offer further insight into the mechanics of the sale of a bulk quantity. According to them, the counterparties to the sale of a pile of grain may sell it based on visual inspection and either stipulate a price for the entire pile, or assign a price to the pile in terms of a unit price. With the latter mode of sale, the counterparties may sell the entire pile at a dirham per bushel. The second method thus requires the counterparties to measure the entire pile to determine the final price after the conclusion of the contract.⁴¹⁹ With the first method of pricing, at the time of the contract, there is no

⁴¹⁸ For further details, see Ibn Qudāma, *Mughnī*, vol. 4, pp. 76-77, ¶. 2914. Ibn Rushd, *Bidāya*, vol. 3, pp. 1301-1302; Shīrāzī, *Muhadhdhab*, vol. 3, p. 44.

⁴¹⁹ Ibn Qudāma, *Mughnī*, vol. 4, pp. 93-98, ¶¶. 2951-2957. Shīrāzī, *Muhadhdhab*, vol. 3, p. 44.

uncertainty about the final price of the transaction. On the other hand, with the second method of pricing, the final price remains uncertain at the time of contracting up until the time when the pile is finally measured. The two methods of pricing may thus lead to different final prices for the very same pile of grain.

Notwithstanding the structural, epistemological, and financial differences between these two modes of sales, Shīrāzī asserts their equivalence by stating that, “This sale is valid, since the form of uncertainty associated with *gharar* is eliminated by knowledge through analysis just as it is by knowledge through synthesis. Thus, if knowledge by synthesis is permissible so is knowledge by analysis.”⁴²⁰ Notwithstanding the fact that both schemes of pricing may lead to different financial outcomes for the counterparties, Shīrāzī argues that they are legally equivalent since knowledge based on analysis and that based on synthesis are equivalent. The equivalence is not based on the equivalence of the financial outcomes, but rather on the fact that the referent is deemed to be the same notwithstanding the different modes of thought applied to it.

Finally, with the exception of Ibn Ḥazm, jurists allow one to specify a portion of a pile of grain or a crop in an orchard for sale when he is certain that the total has more than the specified quantity.⁴²¹ For example, Shīrāzī permits one to sell a *qafīz*, a particular quantity, from the pile, when both counterparties know that the pile contains two

⁴²⁰ Shīrāzī, *Muḥadhdhab*, vol. 3, p. 44. *Li-anna gharar al-jahāla yantaḥī bi'l-‘ilm bi'l-taḥṣīl kamā yantaḥī bi'l-‘ilm bi'l-jumla, fa-idhā jāza bi'l-‘ilm bi'l-jumla jāza bi'l-‘ilm bi'l-taḥṣīl.*

⁴²¹ Ibn Qudāma, *Mughnī*, vol. 4, p. 98, ¶. 2958.

*qafīz*s.⁴²² Otherwise, the transaction is impermissible since “the good of the sale is the remainder, which is unknown after excepting the *qafīz*.”⁴²³ For these jurists, each grain of wheat or date in the pile is the same as all other members of the pile. Furthermore, these jurists do not distinguish between the interior and exterior of these goods. Due to the lack of distinctions in the representation of these goods, knowledge of the exterior of the good is a sufficient basis for a valid sale.

On the other hand, Ibn Ḥazm forbids the sale of a portion of a pile of grain on the basis of a specific measure due to uncertainty about the good of the sale. His opponents claim that there is no uncertainty since a pile of grain is homogenous. Indeed, Shīrāzī states that if the pile is not completely homogenous the seller may specify the exact portion that he will deliver to the buyer in the contract.⁴²⁴ In this case, the seller might specify to except the left corner of the pile. However, Ibn Ḥazm denies the homogeneity of the pile of grain. This is somewhat perplexing because he recognizes that grain is a fungible good for the purposes of a *salam* contract. Ironically, one of the arguments he uses in his discussion of this issue is that his opponents contradict their own views on other contracts.⁴²⁵

Ultimately, from a legal perspective, a sale based on a visual inspection and one based on a verbal description of the dates or grain seem commensurable since both

⁴²² The exact quantity of the *qafīz* varied across time and space in the pre-modern period. In tenth century Baghdad, it was about 45 kilograms. For further details, see Hinz, *Masse*, pp. 48-50.

⁴²³ Shīrāzī, *Muhadhdhab*, vol. 3, p. 44.

⁴²⁴ Shīrāzī, *Muhadhdhab*, vol. 3, p. 41.

⁴²⁵ Ibn Ḥazm, *Muḥallā*, vol. 8, pp. 429-430, ¶. 1458.

methods engender certainty with respect to the quantity and qualities of the goods. It is tempting to map the epistemological equivalence of these two modes of sales onto the planes of thought and communication in the standard model of representation.

Admittedly, the perception of a good is not quite the same as thought of it, but perception furnishes the information that thought labors upon in the opinion of most Muslim scholars. Nevertheless, in the following section, we will see that exceptions to the sales of these goods draw the commensurability of language and thought into question.

II. Exceptions in Sales Involving non-Animals

With exceptions to sales involving non-animals, jurists typically discuss the sale either of dates from a specific orchard or a pile of grain. As we saw in the previous section, jurists agree that these goods are paradigmatic examples of fungible goods whose value can be assessed on the basis of either a visual inspection or verbal description. Nevertheless, when one combines the certainty engendered from a visual inspection with that engendered from a verbal description in one transaction by means of an exception, the commensurability of the certainty engendered from a verbal description and the certainty engendered from a visual inspection breaks down. Keeping with Aristotle's metaphor of knowledge as a picture, one can imagine each mode of purchase as a lens prescribed for a specific eye on a person. Separately, each lens may help a person to see perfectly. However, when a person combines the lenses and uses them at the same time on the same eye they distort the image of what the person is trying to see. In the case of these sales, this metaphor would need to include the idea that while the lenses are being combined the object is also being divided.

According to the jurists, there are four possible ways for a seller to designate a portion of the total good to be excepted: 1) an unspecified portion from the total, 2) a proportion of the total, 3) a specific measure from the total, or 4) or a specific tree in an orchard. All jurists prohibit excepting an undefined quantity from a pile of grain or dates of an orchard. For example, one may not say either, “I will sell you this pile of grain except some of it,” or, “I will sell you part of this pile.”⁴²⁶ In this hypothetical transaction, both quantities are undefined, which causes *gharar*.

On the other hand, regardless of whether the counterparties know the quantity of the good on the basis of a visual inspection or a verbal description, jurists allow one to except a specific proportion of the total quantity. For example, one may except ninety percent of the pile from the sale such that only ten percent of the pile is sold. Only Ibn al-Mājjishūn limits this exception to half of the crop, for reasons that Bājī does not discuss.⁴²⁷ However, Mālik claims that this sale has no *gharar* whether the counterparties know the exact quantity of the pile or estimate it since, “The intent is known and due to this the transaction is devoid of any *gharar*, and thus it is necessarily valid.”⁴²⁸ Likewise, Shīrāzī remarks, “Whoever knows the entirety of something also knows a third, fourth, or any other percentage of it.”⁴²⁹ This opinion is in keeping with

⁴²⁶ Shīrāzī, *Muhadhdhab*, vol. 3, p. 40.

⁴²⁷ Bājī, *Muntaqā*, vol. 6, p. 181, ¶. 1291.

⁴²⁸ Bājī, *Muntaqā*, vol. 6, p. 180, ¶. 1291.

⁴²⁹ Shīrāzī, *Muhadhdhab*, vol. 3, p. 40. For the discussions of Ibn Ḥazm and Ibn Qudāma about the permissibility of excepting a proportion of a good from the sale, see Ibn Ḥazm, *Muḥallā*, vol. 8, p. 431, ¶. 1459; Ibn Qudāma, *Mughnī*, vol. 4, p. 77, ¶. 2917.

his statement about the equivalence of information garnered about a referent on the basis of analysis or synthesis.

Although most jurists permit a sale of the entire quantity on the basis of a visual inspection, *gharar* may emerge when a specific measure is excepted from the total quantity that was defined on the basis of a visual inspection. Both Ibn Qudāma and Ibn Ḥazm prohibit this transaction due to uncertainty with respect to the quantity of the good of the sale.⁴³⁰ According to Ibn Qudāma,

The good of the sale is known on the basis of an appraisal by a visual inspection rather than by measure, but the exception to the good is not made on the basis of a visual inspection and thus it is unknown how much will remain in terms of the quantity of the original visual appraisal.⁴³¹

Although Ibn Qudāma and Ibn Ḥazm agree that one can obtain certainty either through a visual inspection of a good or a description of its measure and quality, the certainty that each method engenders is not commensurable when an exception to a transaction is involved. Rather, the combination of these two forms of certainty creates uncertainty.

Neither Bājī nor Shīrāzī is as sanguine as Ibn Ḥazm and Ibn Qudāma about combining the certainty obtained from a visual inspection with the exception of a verbally defined quantity. According to Shīrāzī, one may except a *qafīz* from the pile if both counterparties are certain that the pile contains two *qafīzs*. Otherwise, the transaction is impermissible since “the sale good is the remainder after excepting the *qafīz* and this is

⁴³⁰ Ibn Ḥazm, *Muḥallā*, vol. 8, pp. 431-434, ¶. 1459; Ibn Qudāma, *Mughnī*, vol. 4, p.76-77, ¶. 2914.

⁴³¹ Ibn Qudāma, *Mughnī*, vol. 4, p. 77, ¶. 2914.

unknown.”⁴³² It is unclear whether Shīrāzī permits this transaction because of a particular ratio or due to certainty about the exact quantity of the entire pile and the excepted portion. Bājī, however, permits one to verbally except a specific quantity of a crop sold on the basis of a visual inspection as long as the excepted portion is a third or less of the total. How one would determine that the excepted quantity is less than a third is unclear since this implies that the counterparties know the exact quantity of the entire pile.

Ibn Ḥazm mocks the Mālikī position that one may except a third of the crop by using a specific unit of measure. He asks why there is no uncertainty when the excepted portion is a third but uncertainty occurs with more than a third.⁴³³ For Ibn Ḥazm, who sees no middle ground between uncertainty and certainty when it comes to *gharar*, the Mālikī position naturally seems contradictory since it offers no justification for the one-third threshold and thus implicitly admits that uncertainty could just as well exist when less than third is excepted. Bājī justifies this position not in terms of *gharar*, but pragmatic ease. He claims that Mālik permits the exception of up to a third so that the seller does not need to measure the entire pile. In this case, the seller measures only the excepted portion.⁴³⁴ In reality, if one applied Bājī’s principle, measuring the excepted portion will always be less work than measuring the entire pile.

Bājī also discusses a more complex transaction in which he identifies the uncertainty created by combining sales on the basis of visual inspection and verbal description of the quantity. If an orchard contains multiple species of dates one may

⁴³² Shīrāzī, *Muhadhhab*, vol. 3, p. 44.

⁴³³ Ibn Ḥazm, *Muḥallā*, vol. 8, pp. 431-432, ¶. 1459.

⁴³⁴ Bājī, *Muntaqā*, vol. 6, p. 183, ¶. 1293.

unproblematically except up to a third of each species. However, there is a disagreement about whether one may except more than one-third of a specific species but less than a third of all of the species in the orchard. On the one hand, Mālik permits this transaction by claiming that there is *gharar* neither with respect to the measure nor the value. Unfortunately, Bājī does not explain whether this *gharar* would affect the excepted portion or remaining portion since this distinction would indicate which counterparty is adversely affected by *gharar*. In fact, another position of Mālik prohibits this transaction since *gharar* increases for the buyer who may have had some specific purpose for buying the mixed species of the orchard.⁴³⁵

Finally, in the case of date trees, one might try to except the dates of several trees. Bājī, Ibn Ḥazm, and Ibn Qudāma all state that if one sells the dates of an orchard and excepts five trees worth of fruit this sale has uncertainty. However, if one specifies (*ta'yīn*) the exact trees to be excepted the contract becomes permissible.⁴³⁶

The central problem that these transactions present is inability to relate the total quantity of the good, excepted quantity, and remainder. Unlike the transactions in which *gharar* arises due to a privation, with these transactions, the counterparties are supposedly certain of the total good and of the excepted portion. In the previous chapter, the sale of immature dates from a specific orchard presented uncertainty with respect to ability to delivery them since those dates are not fungible in the jurists' views. Although the dates of a specific orchard or grain from a specific pile are in a sense unique, for most

⁴³⁵ Bājī, *Muntaqā*, vol. 6, p. 183, ¶. 1293.

⁴³⁶ Bājī, *Muntaqā*, vol. 6, p. 183, ¶. 1293; Ibn Ḥazm, *Muḥallā*, vol. 8, p. 431, ¶. 1459; Ibn Qudāma, *Mughnī*, vol. 4, p. 77, ¶. 2916.

jurists the problem is not that an exception reveals the non-fungibility of the constituent members of the pile or orchard. Rather, the problem for jurists with this transaction is that the certainty gained from a visual inspection cannot be related to an exception that verbally stipulates a specific quantity. However, this position runs counter to their general claim that a visual inspection and verbal description of a fungible good engender certainty.

III. Exceptions in Sales Involving Animals

As stated earlier, in their discussions of sales with exceptions, jurists distinguish between transactions with animals and those with non-animals. Jurists partially model their discussions about animal transactions on their discussions of dates and piles of grain. With the exception of Sarakhsī, the other jurists consider animals to be fungible goods. With animals, one may theoretically except 1) a percentage of it from the whole, 2) a specific portion of it like the leg or liver, and 3) a measure from an unspecified portion. Like an exception to the sale of grain and dates, these transactions with animals may exhibit uncertainty, but in this case a privation causes uncertainty unlike the aporia in the transactions discussed in the previous section.

Most jurists permit the exception of a percentage of a single animal since it creates a partnership between the counterparties.⁴³⁷ Ibn Qudāma states that, “This transaction does not cause uncertainty with respect to the excepted portion or the

⁴³⁷ Bājī, *Muntaqā*, vol. 6, p. 35; Ibn Ḥazm, *Muḥallā*, vol, 8, p. 431, ¶. 1449.

remainder.”⁴³⁸ Abū Ya‘lā, however, forbids this transaction, which he analogizes to excepting the fat of a single animal. According to him, the quantity and quality of the fat is uncertain so that its separation in the contract is invalid (*lā yaṣiḥḥ ifrāduhu*). Ibn Qudāma retorts that,

This excepted portion is defined and its separation from the sale is valid so its exception is like that of a specific tree. But analogizing the known to the unknown in order to assess the illegality of a transaction is invalid (*wa-qiyās al-ma‘lūm ‘alā al-majhūl fī al-fasād lā yaṣiḥḥ*).⁴³⁹

For Ibn Qudāma, when the excepted portion is a percentage, the total and remainder are known. Conversely, the fat cannot be appraised before the animal is slaughtered so that the excepted portion and remainder are both uncertain at the time of the contract. Due to the different distribution of certainty in both transactions, Ibn Qudāma argues that it is incorrect to analogize the exception of a numerical percentage of an animal to the exception of its fat.

The second form of exception, that of a specific portion, raises questions about the nature of the object and the excepted portion. First, jurists distinguish between animals that can be slaughtered and those that cannot be, such as slaves. According to Bājī, one may not except a specific part of a slave due to the inability to deliver it or make use of it (*al-intifā‘ bihi*). If this exception were permissible, the seller, who retains the legs, could order her to standstill and the buyer could not order her to move. Although the claims on the body parts of the slave by each party are certain, the

⁴³⁸ Ibn Qudāma, *Mughnī*, vol. 4, p. 77, ¶. 2917. *Annahu lā yu’addī ilā jahālat al-mustathnā wa-lā al-mustathnā minhu*.

⁴³⁹ Ibn Qudāma, *Mughnī*, vol. 4, pp. 77-78, ¶. 2917.

combination of these claims creates uncertainty respect to the ability of each party to use the slave.⁴⁴⁰ This is because a slave is not simply the sum of his body parts, but also the sum of the seemingly infinite number of actions that those body parts allow a slave to perform. However, these actions cannot be defined due to complex ways that body parts interact. In effect, the body parts cannot serve as referents to define these actions or provide certainty in terms of the contract. Nevertheless, jurists agree that the entire body can serve as referent in terms of the analysis of contracts of hire when one pays for the specific acts of labor of another person. Thus, the human body is construed as an integral and indivisible unity in some sense for commercial transactions.

As for animals that can be slaughtered, jurists distinguish, on the one hand, between body parts that can be inspected before the slaughter and have a utility after the animal is slaughtered and, on the other hand, those body parts that cannot be inspected before the animal is slaughtered. For example, Ibn Qudāma permits one to except the head, limbs, and/or hide of an animal. After citing several traditions in defense of this position, he says that, “The excepted portion and the remainder are both known just as when one sells an orchard but excepts a specific date palm from the transaction.”⁴⁴¹ In this case, no uncertainty arises from combining a visual inspection with the exception of a visible body part on the basis of a verbal description.

On the other hand, the Mālikīs are divided on the exception of visible body parts like the head and trotters. Mālik forbids the exception of visible body parts without the

⁴⁴⁰ Bājī, *Muntaqā*, vol. 6, p. 37.

⁴⁴¹ Ibn Qudāma, *Mughnī*, vol. 4, pp. 78-79, ¶. 2920.

hide such that the seller would keep the meat without the skin. According to Mālik, “It is as though the seller sold it already slaughtered, but only after the slaughter can he know its full description, which he cannot not know at the time of the sale (*ya‘lam min ṣifatihi mā lā ya‘lam al-yawm*).”⁴⁴² Uncertainty occurs because the interior is only fully known after the slaughter. His reasoning thus creates a privation of knowledge about what is under the skin.

Ibn Ḥabīb, however, permits this position by claiming that, “That the seller excepted a specific and visible portion so this does not invalidate the contract. This argument is based on the fact that the hide of the body part is excepted with that body part so due to this the excepted portion can be inspected.”⁴⁴³ In effect, Ibn Ḥabīb argues that the counterparties have certainty with respect to the body part since he construes the skin as part of the excepted body part notwithstanding the fact that it is technically not included in the exception.

As for excepting the hide, Ibn al-Qāsim claims that, “knowledge of the dimensions, type, and quality is impossible (*ta‘dhdhur al-ma‘rifa bi-qadrihi wa-jinsihi wa-jūdātihi wa-radā’atihi*).”⁴⁴⁴ For Ibn al-Qāsim, the hide cannot be fully examined until removed from the animal. His position effectively creates a privation of the referent. Furthermore, he argues that when the seller excepts the hide, he has in fact sold meat that

⁴⁴² Bājī, *Muntaqā*, vol. 6, p. 38.

⁴⁴³ Bājī, *Muntaqā*, vol. 6, p. 38.

⁴⁴⁴ Bājī, *Muntaqā*, vol. 6, p. 38.

cannot be inspected by the buyer. On the other hand Ibn Wahb permits these transactions since, “knowledge of the excepted portion is possible so its exception is possible.”⁴⁴⁵

As for excepting the interior of an animal from the sale, Ibn Ḥazm permits this since the interior never leaves the possession of the seller. Thus, the owner does not require any more knowledge with respect to the good and the buyer gets the visible part so that there is no uncertainty for either counterparty. The only caveat to this permission is that the animal must already be slaughtered.⁴⁴⁶ Ibn Ḥazm thus makes the somewhat counterintuitive argument that by excepting what cannot be examined at the time of the sale, both counterparties have certainty. From Ibn Ḥazm’s perspective, the interior of the animal has not left the owner’s position so the owner does not require any new knowledge about the animal. Or to put it differently, Ibn Ḥazm creates the legal fiction that the owner knows the interior of the animal when he sells the visible part of it.

As for Bājī, he discusses only the sale with the exception of the interior in terms of a fetus and reproductive organs of animals (*mā fī zahr al-fuḥūl wa-laḥm al-fakhdh*). With this transaction, the seller attempts to retain any offspring that the animal may produce. Bājī prohibits these transactions since “the buyer has excepted from the total what we do not know (*mā lam na‘lamhu*). So we do not know what was excepted or the remainder.”⁴⁴⁷ With this category, the excepted quantity is uncertain so that the total,

⁴⁴⁵ Bājī, *Muntaqā*, vol. 6, p. 38.

⁴⁴⁶ Ibn Ḥazm, *Muḥallā*, vol. 8, pp. 399-401, ¶. 1432.

⁴⁴⁷ Bājī, *Muntaqā*, vol. 6, p. 35

which was known, becomes unknown. Furthermore, because the seller cannot use these parts or take possession of them, he has effectively lost control of his property.⁴⁴⁸

Finally, in the case of excepting a measure from the animal without specifying the exact body part or location, Mālik once again has two contradictory views. According to Ibn Wahb, Mālik prohibits this sale because the part that is sold can be neither inspected nor described since it is hidden beneath the skin and unspecified. Ibn Ḥazm also prohibits this transaction.⁴⁴⁹ On the other hand, Ibn al-Qāsim states that Mālik permits this since

The excepted portion remains in the possession of the seller and is not part of the sale. Thus, the contract is not invalidated by virtue of the lack of knowledge of the quality of the excepted portion that the contract contains (*fa-lā yafsud al-'aqd bi-mā yat'allaq bihi min 'adam al-ma'rifa li-ṣifatihi*).⁴⁵⁰

Bājī then argues that if a third or less of its weight is excepted, the sale is valid.⁴⁵¹ Like the position of Ibn Ḥazm in the previous paragraph, this position construes the interior of the animal as remaining in the owner's position such that he has certainty with respect to it.

In the case of exceptions from animals, jurists adopt a broader range of positions than in the case of dates and piles of grain. In part this diversity is due to the larger number of determinations that jurists employ to represent an animal. However, with most of these transactions, uncertainty arises because the referents cannot be analyzed

⁴⁴⁸ Bājī, *Muntaqā*, vol. 6, p. 35.

⁴⁴⁹ Ibn Ḥazm, *Muḥallā*, vol. 8, p. 431, ¶. 1449.

⁴⁵⁰ Bājī, *Muntaqā*, vol. 6, p. 38.

⁴⁵¹ Ibn Rushd, *Bidāyat*, vol. 3, p. 1224.

adequately. The inability to analyze a specific referent leads to the standard forms of privation that cause *gharar*.

IV. The Excepted Fetus

Unlike the previous category of exceptions, which constitutes a constellation of complex transactions that vary in subtle ways, the sale of a mother, whether slave or animal, in which the seller excepts the fetus is much more straightforward. Ibn Rushd forbids this transaction due to uncertainty with respect to the description of the fetus and its safe delivery (*qillat al-thiqa bi-salāmat khurūjihi*). In a similar fashion, Bājī cites an opinion of Mālik, who states,

One should not except a fetus in the mother's womb when she is sold because this causes *gharar*. It is unknown whether the fetus is male or female, beautiful or ugly, defective or healthy, will live or die—all of this reduces the price.⁴⁵²

He explains the prohibition with the following two reasons: 1) the quality and whether the fetus is alive are unknown, and 2) the price is reduced to compensate the buyer for the increased uncertainty and risk of this transaction. Interestingly, this reasoning connects uncertainty and the price in an inverse relationship. Furthermore, with this transaction, *gharar* clearly arises due to a privation since the fetus cannot be examined.

Although Shīrāzī also forbids excepting the fetus from the sale, he does not justify his position on the basis of any arguments about *gharar*. Rather, he states that the fetus follows the mother due to the general prohibition against separating a child from its

⁴⁵² Bājī, *Muntaqā*, vol. 6, p. 35.

mother before the child reaches the age of seven. The fact that he does not invoke *gharar* seems odd since he discusses this transaction in his section on *gharar*.

Sarakhsī also forbids this transaction, but within the context of a larger discussion of gifts. He first examines when one gives someone the fetus in a slave or animal. Although some jurists allow this on the basis of equitable consideration, *istiḥsān*, such that the receiver of the gift may take possession of it once it is born, Sarakhsī states that, “The sounder view is that this is impermissible because what is in the womb has no monetary value at all (*laysa bi-māl aṣlan*) and its existence in actuality is unknown (*lā yu‘lam wujūduhu ḥaqīqatan*).”⁴⁵³ In other words, the fetus does not exist from the perspective of Sarakhsī, and consequently it does not have a representation or any commercial value.

As for Ibn Qudāma, he also agrees that one may neither sell nor except a fetus from sale. Nevertheless, Ibn Ḥanbal permits this transaction on the basis of an analogy to the permissibility of manumitting a female slave but exempting the child. However, Ibn Qudāma argues that with manumission uncertainty with respect to the quality and quantity of the good and delivery are not considered. On the other hand, these factors must be considered in the case of a sale when money is at stake.⁴⁵⁴ Like Sarakhsī, when a property is transferred through a sale, issues of *gharar* become critical for the analysis of the contract but in the case of gift or manumission they are not relevant. The distinction that Ibn Qudāma is developing here is probably ethical. In the case of a sale, it is unfair

⁴⁵³ Sarakhsī, *Mabsūṭ*, vol. 12:4, p. 72.

⁴⁵⁴ Ibn Qudāma, *Mughnī*, vol. 4, p. 79, ¶. 2921.

for one party to give or get something without the knowledge required to determine an equitable compensation. With a gift, in theory at least, the recipient does not need to provide any compensation and so his uncertainty about the value of the gift is not relevant.

Unlike the previous jurists whose views have been presented above, Ibn Ḥazm permits exception of a fetus from the sale of a pregnant slave. His position is in keeping with his permitting the owner to except the interior of animal from the sale as we saw in the previous section. In fact, he classifies this transaction with a number of other ones that he refers to as examples of the sale of the visible without its invisible interior (*bay‘ al-zāhir dūna al-mughayyab fīhi*). This class of sales includes the sale of the musk gland without the musk, eggshells, coconut shells, beeswax without the honey, the hide of an animal without its meat, and fruit without its seeds. According to him, these sales are licit since the property belongs to the seller, who may keep it if he wishes. Property that is visible can be either inspected or sold. On the other hand, what cannot be inspected may be kept since it is not permissible to sell what is uncertain.

Although this argument implies that the sale of the interior of something presents *gharar*, Ibn Ḥazm does not venture too far down this road since it would imply that all sales of goods with interiors that cannot be inspected have *gharar*. Indeed, as we saw above in his discussion about peels and shells, he allows one to sell goods whose interiors cannot be inspected. Ultimately, he concludes this argument by stating that the seller may sell any good whether it can be examined or not.⁴⁵⁵

⁴⁵⁵ Ibn Ḥazm, *Muḥallā*, vol, 8, pp. 398-399, ¶. 1432.

In terms of the fetus, he states that it may be exempted at any point during gestation regardless of whether God has endowed it with a soul (*nafkh al-rūh*) or not. Nevertheless, he asserts that if the child is born nine months and an hour after the sale, the child belongs to the buyer since the mother was not impregnated while in the possession of the seller. Ibn Ḥazm does recognize that some jurists consider this transaction a paradigmatic example of *gharar*, but he side-steps this issue with a digression into cases of *gharar* that some claim arise when a person on his deathbed engages in commerce. For these jurists, there is uncertainty with respect to delivery of the goods specified in the contracts entered into with this sick counterparty. He then cites numerous early legal authorities who permit the manumission and/or sale of a slave along with the exception of its fetus. The implication seems to be that these legal authorities, who otherwise forbid *gharar*, would not have permitted these transactions if *gharar* affected these transactions.

The argument of Ibn Ḥazm is somewhat ironic when one considers the fact that a page earlier he criticizes his opponents for trying to adduce the views of earlier jurists to claim that the transactions of someone on his deathbed have *gharar*. In that case, Ibn Ḥazm states that only the opinion of the Prophet is authoritative.⁴⁵⁶ Furthermore, his argument that one may except a fetus since one may except the interior of other goods is a blatant analogy.

Although the exception of a fetus creates uncertainty in the view of the majority of jurists, this uncertainty is not aporetic, unlike uncertainty in the case of the sale of

⁴⁵⁶ Ibn Ḥazm, *Muḥallā*, vol. 8, pp. 399-401, ¶. 1432.

dates or of a visible body part of an animal. Most jurists do not believe that a fetus can be known through a visual inspection, unlike the case of sales of dates or visible body parts of animals. Thus, in this case, the uncertainty arises from a privation of referent for jurists.

V. Conclusion

In this study, I have examined how discursive knowledge defines uncertainty and *gharar*. In the previous chapters, I examined the ways that the uncertainty associated with *gharar* enables valid representations through the conceptualization of specific forms of uncertainty. In turn, *gharar* creates a relationship between the forms of uncertainty and referents by means of privation. For jurists, *gharar* primarily arises when the relevant referent of analysis is lacking such that this lack leads to a privation of thought that causes uncertainty. However, this privation is modeled on the identity that forms certainty.

In this chapter, I also investigated another example of when discursive knowledge creates uncertainty, but the transactions discussed in this chapter have broader implications for understanding representation. In the case of a pile of grain or dates, one can obtain certainty of the good's quantity through either a visual inspection or a verbal description that conveys its specific quantity. However, the combination of certainty based on a visual inspection along with an exception of a specific quantity leads to *gharar*. The uncertainty reveals an aporia, or a contradiction in the model of representation that grounds discussions of *gharar*. This aporia indicates that language and thought are not always commensurable when it comes to fungible goods as jurists claim

in their discussions of the *salam* contract. To put it more precisely, a verbal description of fungible good does not always provide the same information as a visual inspection. In turn, fungible goods cannot be the univocal and static referents that ground representation if language and thought are not always commensurable with respect to them.

The second set of transactions—those involving exceptions to the sales of animals and slaves—offers further insight into aporetic uncertainty. In the case of these transactions exceptions create the standard privation that causes *gharar*. Naturally, the question arises as to why some exceptions cause an aporia whereas others cause a privation. In their discussions of transactions with animals and slaves, the jurists employ more distinctions in their analyses of these goods than in their discussions of exceptions from the sale of a pile of grain or dates. In particular, with animals, jurists distinguish between the interiors, exteriors, and uses of animals. These distinctions enable jurists to divide each good into a wider constellation of potential transactions, which have different referents for legal analysis. When one can except the interior of a good, the inability to analyze it may engender a privation that causes *gharar*.

On the other hand, in their discussions of the sales of grain or dates, jurists, with the exception of Ibn Ḥazm, conceive of these as homogenous goods that lack any distinction between their interiors and exteriors. Without an interior to examine and except, knowledge of the exterior provides the only basis for the determining the legality of the transaction. Given these parameters for the representation of grain and dates, uncertainty can arise only if verbal descriptions and a visual appraisal are not commensurable.

The use of numerous distinctions to represent animals and the lack of these distinctions to describe grain and dates do not conform to form of reality that conveys itself transparently to mind of everyone. Rather, the discursive practices that a person or group employs determines the representation of reality. One could create a number of other distinctions to represent grain and dates, or conversely, one could reduce the number of distinctions employed to represent animal. Indeed, in the third chapter we witnessed the role of discursive practice in the legal analyses of the sale of goods like eggs, nuts, musk glands, and produce. On the one hand, Ibn Ḥazm treats such goods as undifferentiated wholes where knowledge of the exterior is a sufficient basis for the legality of transactions involving them. On the other hand, Shīrāzī and Ibn Qudāma distinguish between the exterior and interior of these goods in their analyses of *gharar*.

Taken together, both sets of transactions indicate the role of discursive knowledge in defining referents and consequently the forms of uncertainty that arise in the analysis of these transactions. The representation of a good is not purely related to either its intrinsic characteristics or the subjective values that counterparties place on goods. Rather, these transactions reveal how the discursive knowledge in effect configures the ability represent and know a good.

Finally, although discursive knowledge always defines uncertainty as either a privation of certainty in the case of *gharar*, or the incorrect synthesis of thought and referent in *uṣūl al-fiqh* and *kalām*, it does not seem that there is an aporetic certainty opposed to aporetic uncertainty. It is true that in the case of these various transactions one could obtain certainty by excluding the exception or physically separating the piles of grain that the contract designates for sale and for exception. In either case, one cannot

obtain certainty while continuing to combine these two modes of description that separately engender certainty. Rather, this aporetic uncertainty is an irresolvable uncertainty within a system of representation. It is uncertainty that draws into question any fixed and objective point that exists beyond the effects of language and thought.

Conclusion

The Objectivity of *Gharar* and Uncertainty

Throughout this study, I have moved in expanding circles in order to examine *gharar* from different perspectives. I began this study by citing Richard Rorty, who states that,

To know is to represent accurately what is outside the mind; so to understand the possibility and nature of knowledge is to understand the way in which the mind is able to construct such representations. Philosophy's central concern is to be a general theory of representation, a theory which will divide culture up into the areas which represent reality well, those which represent it less well, and those which do not represent it at all (despite their pretense of doing so).⁴⁵⁷

At the time, I quoted Rorty as a means to explore the notion of identity that informs the conception of representation. I also remarked that although a general definition of representation provides a conceptual and terminological starting point for the analysis of uncertainty, the analysis of *gharar* would further problematize this definition of representation. It now seems worthwhile to pull together some of strands of this study by returning to this conceptually pregnant quotation.

If knowledge is the ability to represent accurately and objectively reality, what is uncertainty and how does it relate to certainty? In the case of the form of uncertainty discussed in works of *uṣūl al-fiqh* and *kalām*, it is the inability to represent accurately and objectively reality. Nevertheless, *gharar* is undoubtedly a form of uncertainty that can represent commercial transactions in a meaningfully accurate sense. The question thus arises as to whether *gharar* presents an objectively valid representation of reality and

⁴⁵⁷ Rorty, *Mirror* (Princeton: Princeton University Press, 1979), p. 3.

more broadly risk? In other words, do *gharar* and risk have objective existences and what does that mean?

Undoubtedly, there are real dangers and risks awaiting us in the world, but the question is complex since any response to it must invoke a model of representation that will configure the use of a matrix of terms like objectivity, subjectivity, truth, and error. In light of preceding chapters, there are two models that one might use to address this question: 1) an Aristotelian model of representation and 2) a discursive model of representation. These two models relate to a larger question about the relation between language and reality. On the one hand, the Aristotelian model argues for the primacy of reality, which mediates thought and the usage of language. On the other hand, the discursive model argues that language, or more specifically discourse, mediates thought and thus our understanding of reality.

Throughout this paper, I have drawn on both models of representation to examine *gharar*. Although concerns about how models of representation affect our research and intellectual debates might seem like a particularly modern or even post-modern concern, in fact one finds the same concerns in the famous debate between the Mu'tazilite grammarian Abū Sa'īd al-Sīrāfī (d. 368/979) and the Christian logician Abū Bishr Mattā b. Yūnus (d. 328/940). In this debate, Mattā unsurprisingly adopts the Aristotelian model of representation in order to defend the universality of logic and truth due to their contingency on reality. On the other hand, Sīrāfī adopts, at least for the purposes of his

debate with Mattā, the discursive model of representation in order to argue for the contingency of knowledge upon language.⁴⁵⁸

I. Objective Risk

A claim for an objective form of risk requires a model of representation like the Aristotelian model examined in this study. As stated throughout this study, the Aristotelian model of representation has several premises. First, reality must act as reference point against which the validity of language and thought are measured. This model assures the univocality of reality and knowledge through the claim that the referents that populate reality have essences that define reality. Second, this model presumes the equality of information found in reality, thought, and communication. True, languages differ, but knowledge, which is truth, must be the same for everyone since it matches reality. Finally, uncertainty and certainty must be two discrete forms of thought that do not mix with each other. Although one may progress from uncertainty to certainty, these two forms of thought must be essentially different otherwise truth would have an ambiguous value.

These premises ensure that there is an objective reference point against which to judge thoughts and statements. Furthermore, the model of representation offers the hope

⁴⁵⁸ For a record of this debate, see Abū Ḥayyān al-Tawḥīdī, *Kitāb al-Imtā' wa'l-mu'ānasa*, ed. Aḥmad Amīn and Aḥmad al-Zayn, 3 vols. (Cairo: Maṭba'at Lajnat al-Ta'lif, ND.), vol. 1, pp. 107-128. For a translation of this debate, see D.S. Margoliouth, "The Discussion Between Abu Bishr Matta and Abu Sa'id al-Sirāfi on the Merits of Logic and Grammar," in *Journal of the Royal Asiatic Society of Great Britain and Ireland* (Jan. 1905): pp 79-209. For a study of this debate and Sirāfi's grammatical theory, see Muhammet Gunaydin, "Al-Sirāfi's Theory of 'Lingua-Logical' Grammar: An Analytical Study of the Grammatical Work of al-Sirāfi (Sharḥ Kitāb Sibawayhi) Within the Context of a Discussion on Language and Logic in Medieval Islam." (Ph.D. Diss., University of Pennsylvania, 2006).

that with enough time and thought we will be able to understand everything as it truly is. Conversely, it offers a means to explain uncertainty. In the case of *uṣūl al-fiqh* and *kalām*, the cause of uncertainty is a mismatch between thought and reality. Nevertheless, for the uncertainty associated with *gharar* and risk to be objective and have valid representations, they must have a basis in reality rather than the failings of human minds and emotions. In the case of Islamic commercial law, the lack of a specific referent creates a privation of thought and that privation engenders *gharar*. In turn, the privation creates a relationship between the forms of uncertainty associated with *gharar* and referents.

Although it is beyond the scope of this study, modern discussions of financial risk implicitly and explicitly adopt some of the premises of the Aristotelian model to represent risk. Admittedly, modern discussions of financial risk are very different from those of *gharar*. Specifically, modern discussions of financial risk relate to theories of capital allocations whereas *gharar* relates to the theory of the legality of contracts. Nevertheless, one can note some important similarities between the two discourses. Like discussions of *gharar* that conceptualize several discrete forms of uncertainty, discussions of financial risk conceptualize several discrete forms of risk, such as market risk, credit risk, interest risk, insurance risk and currency risk to name just a few examples.

More importantly, like the Aristotelian model of representation, contemporary discussions of risk assert the primacy of ontology in defining the risks that one faces. Indeed, the notions of ontology that ground modern discussions of financial risk are radically different from those of *gharar* in some ways. Nevertheless, Nicholas Rescher

asserts that, “At bottom risk is an ontological not an epistemological category: it has to do with action affecting the chance of mishap itself, not with the recognition or acknowledgement of this chance.”⁴⁵⁹ Discussions of financial risk define it as possible negative outcomes and their chances of realization. Furthermore, this conception of risk claims that these negative outcomes have an objective existence that can be measured and represented statistically.⁴⁶⁰

Nevertheless, Rescher acknowledges that there is an epistemological aspect to risk since one can be exposed to negative outcomes without knowing them or correctly assessing them. Furthermore, people prioritize the risks they will examine and address in accordance with their personal values. He, however, argues that the discussion of risk should focus on modeling these negative outcomes and their objective probabilities instead of examining the knowledge and values of actors.⁴⁶¹

Admittedly, both modern notions of financial risk and *gharar* enable one to make better decisions about commercial transactions. Yet, in both cases, one can only represent known-unknowns. Specific forms of knowledge subsume notions of modern financial risk and *gharar* so as to enable representations about very particular situations. One cannot make informed statements or decisions about unknown-unknowns, which must exist beyond knowledge and representation—otherwise they would be known.

⁴⁵⁹ Nicholas Rescher, *Risk: A Philosophical Introduction to the Theory of Risk Evaluation and Management* (Washington D.C.: University Press of America, Inc., 1983), p. 7.

⁴⁶⁰ George E. Redja, *Principles of Risk Management and Insurance*. 10th ed. (New York: Pearson Addison Wesley, 2008), p. 3.

⁴⁶¹ Rescher, *Risk*, pp. 6-7.

More importantly, the discussions and analysis of *gharar* have drawn into question many of the premises that validate the Aristotelian model of representation. Our methods of analysis, descriptions, and concepts mediate our understanding and representation of reality in ways that make it impossible to capture any objective essence of a referent and reality. As we saw in the preceding chapters, although jurists frequently discuss the same transactions and goods, they, in many cases, conceive of the goods and transactions in very different terms. For example, the udder of a cow and its future milk production can be the site of either uncertainty or certainty depending on whether one analyzes the future milk production of a single cow, or uses the law of large numbers to analyze a herd's future production.

Similarly, jurists from the different schools invoke the same forms of uncertainty to prohibit transactions. Nevertheless, the ways that they define each form of uncertainty reveals differences that range from the subtle to the significant. These differences reflect the different forms of knowledge and reasoning that each jurist employs to conceptualize the forms of uncertainty associated with *gharar*. These forms of thought thus do not conform to reality in a simple and univocal fashion as the Aristotelian model of representation claims for knowledge to be objective and true.

Finally, the Aristotelian model of representation claims that language and thought are equivalent in their ability to represent reality. True, the Aristotelian model recognizes the fact that the mind abstracts information in order to create more general concepts and judgments about reality. Nevertheless, it is ultimately reality that grounds, creates, and determines the validity of these abstract thoughts. Yet in commercial law, we saw that jurists distinguish between fungible goods, which language can objectively represent, and

non-fungible goods, which language cannot objectively represent. In addition, the distinction between fungible and non-fungible does not have an objective and stable basis in reality as the Aristotelian model claims. To be precise, chapter five showed that the sale of grain, the fungible good *par-excellence*, is illegal when one combines a sale based on visual inspection with a verbal exception to sale of the pile of the grain. Although the good has not changed in this transaction, combining certainty from thought with that from a verbal description creates uncertainty due to the inequality of these two forms of knowledge.

If one accepts the Aristotelian model of representation and its premises in order to save an objective form of risk and *gharar*, the only way to explain the differences between jurists' descriptions of the same goods and transactions is to invoke negative assessments about their ideological commitments. Undoubtedly, the jurists have ideological commitments, but so does everyone. Indeed, it is these commitments that make the Islamic intellectual tradition so rich and complex.

In the following section, I will examine another approach to framing and answering the question whether risk and *gharar* can have objective representation. This approach saves many of the insights that I have gained over the course of this study from employing the Aristotelian model of representation as an analytical framework. At the same time, it offers a means to understand the differences among the jurists in a more positive light.

II. Discourse and Objectivity

One of the key arguments of Foucault is that when we analyze a statement we do not directly access the thoughts of the one who pronounced it. Furthermore, statements do not point to an univocal and transparent reality that we need to simply turn our eyes and minds towards in order to understand. Rather, we have only access to discourse and its constituent elements, such as the concepts, forms of reasoning, themes, and position of the subject as producer and patient of discourse. Nevertheless, Foucault is not arguing for a pure an unmediated form of subjectivity that rules over everything. Rather he claims that discourse and the repetition of its elements have an objectivity that allows one to cut across the standard divisions of knowledge and chronologies that organize scholarship on a particular topic.

The discussions of *gharar* examined in this study reveal a discursive regularity. The jurists share the same forms of uncertainty to explain *gharar*. Even in the case of jurists who have additional forms of uncertainty that cause *gharar*, these additional forms are clearly derived from the primary forms of uncertainty that all of the jurists share. Furthermore, the jurists discuss the same types of transactions in order to elaborate *gharar*. Privation structures the relationship between referent and thought for all of the jurists. Finally, the privation is the foundation of a schema that uses opposition, analogy, and resemblance to represent *gharar* in more complex ways.

Taken together these traits form a unity that differentiates the conception of *gharar* and the forms of uncertainty associated with it from other discussions of risk and uncertainty found in other fields. Admittedly, the jurists differ about many aspects of these discursive traits. Nevertheless, the unity allows jurists to debate and articulate their

views in a manner that seemed logical, compelling, and significant to members of all schools. No jurist invokes a transaction, form of uncertainty, or relationship between thought and a referent that differs significantly from this discursive unity associated with *gharar*. In other words, it is within the bounds of this unity that jurists can elaborate different opinions and speak authoritatively. Even when a jurist denies an element of this discursive unity, such as Ibn Ḥazm does when he rejects uncertainty with respect to the delivery as a cause of *gharar*, he must acknowledge its accepted standing within legal discourse by adducing arguments against it. This unity thus has an objectivity that jurists must acknowledge in their discussions and analysis of *gharar*. To the extent that Islamic law was enforced— a question that this study sidestepped—this discursive unity would have also affected society at large. Thus, the objectivity of the discursive unity may have created an objective social order too.

III. Future Research

As stated in the previous section, the discursive unity is a tool that enables contemporary scholars to break from given paradigms of scholarship in order to configure the contours of their research in new ways. Discourse analysis does not provide an objective viewpoint outside of discourse. Rather it works within discourse in order to understand and critique it. Likewise, in my dissertation, I employed the Aristotelian model of representation and more generally the insights of works of *uṣūl al-fiqh* and *kalām* to provide a conceptual and terminological framework for the analysis of *gharar*. However, this study revealed the important differences between the forms uncertainty associated with *gharar* and the form of uncertainty defined in the introductions of works

of *uṣūl al-fiqh* and *kalām*. In turn, the different conceptions of uncertainty offer important insight into the functioning of representation.

Although this study focused on uncertainty as it relates to *gharar*, uncertainty is part of other fields of Islamic scholarship and deserves further research. Such research would offer more insight into the notions of representation that ground other fields of Islamic scholarship and how different fields relate to one another. Such research might either affirm the standard divisions and hierarchies between fields of Islamic scholarship, or it might reveal unexamined relationships and distinctions between them. Whatever the case may be, what is certain is any understanding of representation and epistemology seems incomplete without a complete appreciation of the role of uncertainty.

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